UNITED STATES REPORTS

VOLUME 511

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1993

MARCH 22 THROUGH JUNE 7, 1994

FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
HARRY A. BLACKMUN, Associate Justice.*
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.

OFFICERS OF THE COURT

JANET RENO, Attorney General.
DREW S. DAYS III, Solicitor General.
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
ALFRED WONG, Marshal.
SHELLEY L. DOWLING, Librarian.

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*For note, see p. IV.

NOTE

*JUSTICE BLACKMUN announced his retirement on April 6, 1994, effective "as of the date the Court 'rises' for the summer or as of the date of the qualification of my successor, whichever is later, but, in any event, not subsequent to September 25, 1994."

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective October 1, 1993, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, CLARENCE THOMAS, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

October 1, 1993.

(For next previous allotment, and modifications, see 502 U. S., p. VI, and 509 U. S., p. V.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1988 edition.

Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered.

	Page
Abanatha *v.* United States	1035
Abbeville General Hospital; Ramsey *v.*	1032
Abbott; Duffey *v.*	1091
Abidekun *v.* Commissioner of Social Service of N. Y. C.	1064
Abshire *v.* United States	1071
Acosta *v.* United States	1059
Adamo *v.* State Farm Lloyds Co.	1053
Adams, *In re*	1068
Adams *v.* Evatt	1001
Adams *v.* United States	1011,1021,1109,1118
Adepegba *v.* United States	1054
Adesanya *v.* Immigration and Naturalization Service	1101
Administrator, Eastern Pa. Psychiatric Institute; Duvall *v.*	1074
Advanced Micro-Devices, Inc.; Constant *v.*	1084
Adventist Health System/Sunbelt, Inc.; Peterson *v.*	1068
Advocates for Life, Inc. *v.* Lovejoy Specialty Hospital, Inc.	1070
Aeroservice Aviation Center, Inc.; Diaz del Castillo *v.*	1082
Aetna Life Ins. Co.; Spain *v.*	1052
Agajanian, *In re*	1139
Aguilar *v.* United States	1086
Aguirre *v.* California	1090
Ahamefule *v.* United States	1059
A. J. Industries, Inc. *v.* Hedges	1127
Akaka; Loa *v.*	1070
Akaka; Price *v.*	1070
Akech *v.* United States	1149
Alabama; Cade *v.*	1046
Alabama; Carroll *v.*	1047
Alabama; Coral *v.*	1012
Alabama; Ford *v.*	1078

Page
Alabama; Hallford *v.* 1100
Alabama; Jenkins *v.* 1012
Alabama; Jordan *v.* 1112
Alabama; Streeter *v.* 1110
Alabama; Tarver *v.* 1078
Alabama *v.* Watkins 1137
Alabama; Williams *v.* 1012
Alabama *ex rel.* T. B.; J. E. B. *v.* 127
Alameda-Contra Costa Transit Dist.; Sanford *v.* 1007,1102
Albemarle-Charlottesville Joint Security Complex; Greene *v.* 1089
Alexander *v.* California 1087
Alexander *v.* Texas 1100
Alexander Securities, Inc. *v.* Mendez 1150
Algemeen Burgerlijk Pensioenfonds; Ejay Travel, Inc. *v.* 1107
Allen *v.* California 1089
Allen *v.* Illinois 1075
Allen *v.* Lockley 1087
Allen *v.* Oklahoma 1075
Allied-Bruce Terminix Cos. *v.* Dobson 1140
Allied Van Lines, Inc. *v.* Oberg 1108
Alls *v.* New York 1090
Allstate Ins. Co. *v.* Louisiana Ins. Guaranty Assn. 1142
Allum *v.* Second Judicial District Court of Nev. 1109
Almodovar *v.* New York 1131
Alston *v.* Swisher 1057
Alter *v.* United States 1057
Alvarca Alvarez *v.* California 1089
Alvarez *v.* California 1089
Alvarez *v.* United States 1010,1134
Alvarez-Sanchez; United States *v.* 350
Ambrose, Wilson, Grimm & Durand; Krug *v.* 1108
AmClyde; McDermott, Inc. *v.* 202
Amerada Hess Corp. *v.* Owens-Corning Fiberglas Corp. 1051
American Airlines; Wells *v.* 1080
American Airlines, Inc. *v.* Wolens 1017
American Bank of Conn.; Ivimey *v.* 1064
American Bureau of Shipping; Sundance Cruises Corp. *v.* 1018
American Community Mut. Ins. Co.; Tregoning *v.* 1082
American Cyanamid Co.; North American Vaccine, Inc. *v.* 1069
American Medical International, Inc.; Harris *v.* 1068
American Medical Systems, Inc.; Medical Engineering Corp. *v.* 1070
American Telephone & Telegraph Co.; Collins Licensing *v.* 1137
Amerman *v.* United States 1031
Andersen *v.* United States 1097

	Page
Anderson, *In re*	364,1029
Anderson *v.* Collins	1064,1065
Anderson *v.* Humana, Inc.	1027
Anderson *v.* United States	1057
Andriola *v.* Antinoro	1031
Andrisani *v.* Superior Court of Cal., Appellate Dept., L. A. County	1064
Andrus *v.* United States	1024
Angelone; McDonough *v.*	1088
Anglero *v.* United States	1020
Angulo-Lopez *v.* United States	1041
Anolik *v.* Sunrise Bank of Cal.	1047
Anonsen *v.* Donahue	1128
Anthony *v.* United States	1114
Antinoro; Andriola *v.*	1031
Araujo Juarez *v.* California	1088
Arave *v.* Beam	1060
Arbelaez *v.* Florida	1115
Arce-Ramos *v.* United States	1092
Arias *v.* United States	1058
Arizona; Bible *v.*	1046
Arizona; Comer *v.*	1026
Arizona *v.* Evans	1126
Arizona; Hess *v.*	1149
Arizona; Schackart *v.*	1046
Arizona; Tripati *v.*	1072
Arizona; Villegas Lopez *v.*	1046
Arizona; West *v.*	1063
Arkansas; Cleveland *v.*	1080
Arkansas; Davis *v.*	1026
Arkansas; Miller *v.*	1128
Arkansas; Prince *v.*	1093
Arkansas Dept. of Human Services; Lensing *v.*	1037
Arkansas Dept. of Pollution Control & Ecology; Ark. Peace Ctr. *v.*	1017
Arkansas Peace Ctr. *v.* Ark. Dept. of Pollution Control & Ecology	1017
ARMCO, Inc.; Aus *v.*	1082
Armenta-Lopez *v.* United States	1134
Armesto *v.* Weidner	1090
Armontrout; McConnell *v.*	1101
Arnett *v.* Kellogg Co.	1040
Arney *v.* Roberts	1055
Arnold *v.* United States	1094
Arthur *v.* Bell Atlantic Corp.	1106
Artuz; Hutchinson *v.*	1041
Arvonio; Clemons *v.*	1148

Page
Arvonio; Maxwell *v.* 1110
Asam *v.* Harwood 1078
Asgrow Seed Co. *v.* DeeBees 1029
Asgrow Seed Co. *v.* Winterboer 1029
Askew *v.* Tucker 1023
Asrar *v.* United States 1045
Associated Industries of Mo. *v.* Lohman 641
Atamantyk *v.* Department of Defense 1113
Atkinson *v.* Idaho 1076
Attorney General; O'Murchu *v.* 1008
Attorney General of Fla.; Graham *v.* 1128
Attorney General of Me.; Police *v.* 1069
Attorney General of N. Y. *v.* Moody 1084
Attorney General of R. I.; D'Amario *v.* 1111
Attorney General of S. C.; Pressley *v.* 1110
Attwood *v.* Chiles 1088
Atwater *v.* Florida 1046
Aubry; Livadas *v.* 1016,1028
Auburn; Tri-State Rubbish, Inc. *v.* 1106
Aus *v.* ARMCO, Inc. 1082
Austin *v.* United Parcel Service 1152
Autery *v.* United States 1081
Authement *v.* Citgo Petroleum Corp. 1019
Avakian *v.* United States 1001
Avenenti; Cornellier *v.* 1057
Avery *v.* United States 1148
Ayrs *v.* Prudential-LMI 1133
Azen, *In re* 1140
B.; J. E. B. *v.* 127
Bachtel *v.* United States 1108
Backstrom *v.* Iowa District Court for Jones County 1042
Bacon *v.* Department of Air Force 1043
Badger Coal Co.; Shockey *v.* 1035,1153
Bagley *v.* California 1022
Bailey, *In re* 1002
Bailey *v.* United States 1025
Bain *v.* Florida 1132
Baker *v.* Lopatin, Miller, et al., Attorneys at Law, P. C. 1056
Baker *v.* Maryland 1078
Baker *v.* Shalala 1035,1153
Baker *v.* United States 1145
Balark *v.* Chicago 1082
Ball *v.* United States 1114
Ballantine *v.* United States 1045

Page
Balog *v.* Shalala 1110
Baltimore Gas & Electric Co.; Hicks *v.* 1102
Baltimore Municipal Golf Corp.; Clark *v.* 1107
Bank of America N. T. & S. A.; McMahon *v.* 1022
Banks *v.* United States 1135
Bara *v.* United States 1077
Barajas; Northrop Corp. *v.* 1033
Barber *v.* United States 1041,1087,1094
Bardson *v.* Cross 1074
Barfield *v.* Secretary, N. C. Dept. of Crime Control 1109
Barker *v.* United States 1095
Barmore *v.* United States 1095
Barnes *v.* Texas 1063
Barnes *v.* United States 1024
Barnett *v.* United States 1060
Barnum *v.* United States 1112
Barquet *v.* Maass 1022
Barrero *v.* United States 1135
Barreto *v.* McClellan 1096
Barth *v.* Duffy 1030
Bartlett; Qutb *v.* 1127
Bartlett; Richards *v.* 1074,1112
Bartlett *v.* Vance 1040,1102
Bascomb; Seattle *v.* 1127
Bauman; Colorado Dept. of Health *v.* 1004
Baxter *v.* Superior Court of Cal., Los Angeles County 1056
Beam; Arave *v.* 1060
Beard *v.* West 1018
Beaumont, *In re* 1105
Beavers *v.* Collins 1014
Bedford *v.* United States 1022
Beecham *v.* United States 368
Behringer *v.* Texas 1012
Bellah; Shimizu *v.* 1032
Bell Atlantic Corp.; Arthur *v.* 1106
Belmonte Romero *v.* California 1085
Beltran-Lopez *v.* Florida 1115
Benavides *v.* United States 1093
Bengali *v.* United States 1092
Benitez, *In re* 1141
Bennett, *In re* 1016
Bennett *v.* Borg 1109
Bennett *v.* United States 1003
Benson *v.* Hargett 1047

	Page
Benson *v.* Stepanik	1075
Benson *v.* United States	1086
Berchard; Ternes *v.*	1127
Berg *v.* California	1072
Berg *v.* Dentists Ins. Co.	1032
Berhanu; Metzger *v.*	1106
Berk; DiDomenico *v.*	1081
Berks County *v.* Murtagh	1017
Bernabe *v.* California	1089
Bernard *v.* Connick	1005
Berry *v.* California	1090
Bertrand; John E. Graham & Sons *v.*	1070
Beson *v.* Wisconsin	1072
Beuke *v.* Ohio	1100
Beyer; Shakur *v.*	1039
BFP *v.* Resolution Trust Corp.	531
Bianco *v.* United States	1069
Bible *v.* Arizona	1046
Biddings *v.* Brigano	1076
Bieregu *v.* United States	1058
Billings *v.* Tavaglione	1142
Bishop Estate; Eline *v.*	1009
Bituminous Casualty Corp.; Tonka Corp. *v.*	1083
Black *v.* Colorado	1109
Blackston *v.* Skarbnik	1102
Blankenship; Carpenter *v.*	1133
Blazak; Lewis *v.*	1097
Bledsoe, *In re*	1104
Blow *v.* United States	1090
Blue Cross & Blue Shield of Va.; Madonia *v.*	1019
Boalbey *v.* Hawes	1138
Boalbey *v.* Rock Island County	1076
Board of Bar Examiners of Del.; Ziegler *v.*	1084
Board of County Comm'rs of Osage County; Sharp's Pawn Shop *v.*	1031
Board of County Comm'rs of Osage County; Winters *v.*	1031
Board of Equalization of Chatham County; York Rites Bodies of Freemasonry of Savannah *v.*	1070
Board of Governors, FRS; CBC, Inc. *v.*	1142
Board of Governors of Registered Dentists of Okla. *v.* Jacobs	1082
Board of Trustees for State Colleges & Univs. of La.; Paddio *v.*	1085
Board of Trustees, Univ. of Ala.; Wu *v.*	1033
Boca Grande Club, Inc. *v.* Florida Power & Light Co.	222
Boggs *v.* California	1143
Boise; Brown *v.*	1055

Page
Bonner Mall Partnership; U. S. Bancorp Mortgage Co. *v.* 1002,1140
Bonnette; Odeco Oil & Gas Co., Drilling Div. *v.* 1004
Boothe *v.* Stanton 1009,1153
Borbon *v.* California 1087
Borg; Bennett *v.* 1109
Borg; Smith *v.* 1088
Borromeo *v.* United States 1048
Boston; Polyak *v.* 1053
Boutte; Sellick Equipment, Inc. *v.* 1018
Bowles; Good *v.* 1039
Boyd *v.* Goolsby 1107
Boyd *v.* United States 1058
Brackett *v.* Peters 1072
Bradford *v.* Bradford 1033
Bradley Univ.; Whitehead *v.* 1055
Bradshaw *v.* United States 1130
Bragg *v.* United States 1096
Branham *v.* United States 1112
Brannigan; Wehringer *v.* 1048
Branton *v.* Federal Communications Comm'n 1052
Brawner *v.* United States 1034
Bray Terminals, Inc. *v.* New York State Dept. of Tax. and Fin. 1143
Breckenridge *v.* California 1092
Breeden; McReady *v.* 1025
Breest *v.* Brodeur 1074
Brennan; Farmer *v.* 825
Brennan; Holly *v.* 1047,1152
Brenner; Suda *v.* 1022
Brigano; Biddings *v.* 1076
Brinson *v.* Grayson 1055
Britt *v.* United States 1004
Brizendine; Cotter & Co. *v.* 1103
Brodeur; Breest *v.* 1074
Brothers *v.* Brothers 1128
Broussard *v.* United States 1096
Brower *v.* United States 1149
Brown *v.* Boise 1055
Brown *v.* Brown 1032
Brown; De Maio *v.* 1126
Brown *v.* Gardner 1017
Brown *v.* Illinois 1038
Brown; Jeffress *v.* 1112
Brown; McNaron *v.* 1108
Brown *v.* Norris 1009

Page
Brown; Ticor Title Ins. Co. *v.* 117
Brown *v.* Two Unknown Marshals 1020
Brown *v.* United States 1025,1034,1043,1057,1114,1146,1148
Brown-Brunson *v.* Hunter 1057
Brown Group, Inc.; Hicks *v.* 1068
Browning-Ferris, Inc.; White *v.* 1142
Brown Shoe Co.; Hicks *v.* 1068
Broyde *v.* Gotham Tower, Inc. 1128
Brunwasser *v.* Steiner 1067
Bryant; North Carolina *v.* 1001
Bryant *v.* U. S. District Court 1110
B. S. *v.* District of Columbia 1072
Bseirani *v.* Mahshie 1083
B&T Towing; Flynn *v.* 1010,1102
Buchanan *v.* South Carolina 1074,1153
Bucksa *v.* Federal Bureau of Investigation 1041
Budman, *In re* 1027
Buell *v.* Ohio 1100
Buford Evans & Sons; Polyak *v.* 1053
Bulger *v.* United States 1094
Buracker *v.* Wilt 1129
Burchill *v.* Kish 1006,1101
Burciaga *v.* United States 1096
Bureau of National Affairs, Inc.; Conboy *v.* 1076
Burgenmeyer *v.* Michigan 1045
Burke *v.* United States 1096
Burnett *v.* Fairley 1132
Burrell *v.* United States 1076
Burton; Streeter *v.* 1054,1132
Burton *v.* United States 1149
Busby *v.* New Jersey 1035
Bush *v.* Commonwealth Edison Co. 1071
Butt *v.* United States 1095
Butterworth; Graham *v.* 1128
Byers *v.* Montana 1009
Byers *v.* United States 1135
Bynum *v.* State Farm Ins. Co. 1009
Byrd *v.* Ohio 1015
Byrd *v.* United States 1130
Cabrera *v.* United States 1024
C & A Carbone, Inc. *v.* Clarkstown 383
Cade *v.* Alabama 1046
Cadle Co. II, Inc.; Lewis *v.* 1053
Cain *v.* Missouri 1086

	Page
Cairo, *In re*	1104
Calderon *v.* Clair	1080
Calderon *v.* Johnson	1085
Calderon; Kukes *v.*	1093
Caldwell *v.* Kroner	1024
Califano *v.* United States	1011
California; Aguirre *v.*	1090
California; Alexander *v.*	1087
California; Allen *v.*	1089
California; Alvarca Alvarez *v.*	1089
California; Araujo Juarez *v.*	1088
California; Bagley *v.*	1022
California; Belmonte Romero *v.*	1085
California; Berg *v.*	1072
California; Bernabe *v.*	1089
California; Berry *v.*	1090
California; Boggs *v.*	1143
California; Borbon *v.*	1087
California; Breckenridge *v.*	1092
California; Calvert *v.*	1089
California; Casio *v.*	1035
California; Castillo *v.*	1056
California; Castro Lopez *v.*	1110
California; Chase *v.*	1086
California; Clark *v.*	1087
California; Consiglio *v.*	1075
California; Contreras *v.*	1024
California; Cornejo *v.*	1090
California; Culver *v.*	1006
California; Cummings *v.*	1046
California; Cummins *v.*	1073
California; Davilla *v.*	1088
California; Directo *v.*	1088
California; Dober *v.*	1038
California; Douglas *v.*	1038
California; Dunlap *v.*	1087
California; Dyer *v.*	1038
California; Favors *v.*	1091
California; Figueroa *v.*	1008
California; Flack *v.*	1018
California; Flores *v.*	1090
California; Garceau *v.*	1139
California; Garcia *v.*	1073
California; Gay *v.*	1046

Page

California; Gear *v.* 1088
California; Gipson *v.* 1112
California; Gomez *v.* 1039
California; Grajeda *v.* 1086
California; Hankins *v.* 1086
California; Hanzy *v.* 1056
California; Hilarie *v.* 1039
California; Hill *v.* 1133
California; Hillburn *v.* 1074
California; Hoskins *v.* 1035
California; Johnson *v.* 1013,1088
California; Kibbe *v.* 1021
California; King *v.* 1035
California; Laan *v.* 1102
California; Lofton *v.* 1091
California; Lopez Gonzalez *v.* 1073
California; Lucero *v.* 1111
California; Marshall *v.* 1091
California; Martinez *v.* 1145
California; McClendon *v.* 1085
California; McMurray *v.* 1091
California; Medina *v.* 1111
California; Meeks *v.* 1110
California; Mena *v.* 1109
California; Minh Trong *v.* 1144
California; Mitchell *v.* 1145
California; Moerman *v.* 1031
California; Morin *v.* 1091
California; Ortega *v.* 1054
California *v.* Parr 1005
California *v.* Pimentel 1125
California; Pitts *v.* 1009
California; Ponce de Leon *v.* 1073
California; Pugh *v.* 1091
California; Ray *v.* 1072
California; Reed *v.* 1006
California; Reynolds *v.* 1111
California; Rivera *v.* 1145
California; Rogers *v.* 1088
California; Roldan *v.* 1091
California; Ross *v.* 1088
California; Sandoval *v.* 1,1101
California; Silva *v.* 1092
California; Simon *v.* 1072

Page
California; Snider *v.* 1090
California; Spencer *v.* 1144
California; Stansbury *v.* 318
California; Stoddard *v.* 1086
California; Tenner *v.* 1056
California; Terrell *v.* 1007
California; Thompson *v.* 1038
California; Tizeno *v.* 1089
California; Tooze *v.* 1074
California; Trippet *v.* 1073
California *v.* U. S. District Court 1005
California; Vailuu *v.* 1022
California; Von Schiget *v.* 1039
California; Warren *v.* 1021
California; Washington *v.* 1056
California; Weaver *v.* 1127
California; Williams *v.* 1022,1055
California; Witt *v.* 1132
California; Wolfe *v.* 1145
California; Woodruff *v.* 1087
California; Wormuth *v.* 1075
California; Wright *v.* 1087
California; Yeamons *v.* 1075
California; Young *v.* 1090
California Dept. of Transportation; Karim-Panahi *v.* 1048
California Workers' Compensation Appeals Bd.; Spaletta *v.* 1006
Calvento *v.* Garza, Jure & King 1055
Calvert *v.* California 1089
Camoscio *v.* Hall 1107
Campbell; Harris *v.* 1101
Campbell *v.* United States 1036
Campbell *v.* Wood 1118,1119
Campos-Rozo *v.* United States 1044
Capital Area Right to Life, Inc. *v.* Downtown Frankfort, Inc. 1135
Capital Area Right to Life, Inc.; Downtown Frankfort, Inc. *v.* 1126
Cardenas *v.* United States 1134
Cardwell *v.* United States 1051
Carlson; Magnolia Court Apartments, Inc. *v.* 1084
Carmichael; Singleton *v.* 1144
Carpenter, *In re* 1027
Carpenter *v.* Blankenship 1133
Carpenter; Police *v.* 1069
Carpenter *v.* United States 1043,1135
Carrier *v.* United States 1044

Page
Carroll *v.* Alabama 1047
Carter, *In re* 1068
Carter; Lipovsky *v.* 1019
Carter *v.* Rone 1045
Carter; Sowders *v.* 1097
Carter *v.* Vaughn 1040
Casados *v.* Denver 1005
Cascade General, Inc. *v.* National Labor Relations Bd. 1052
Casey; Lewis *v.* 1066
Casio *v.* California 1035
Cassel; Tucker *v.* 1141
Cassell *v.* Lancaster Mennonite Conference 1085
Castaneda *v.* United States 1041
Castillo *v.* California 1056
Castro, *In re* 1104
Castro *v.* United States 1024
Castro Lopez *v.* California 1110
Catlett *v.* Virginia 1005
Causey *v.* United States 1024
Cazares-Barragan *v.* United States 1115
CBC, Inc. *v.* Board of Governors, FRS 1142
Cedarapids, Inc.; Mendenhall *v.* 1031
Cellswitch L. P. *v.* Federal Communications Comm'n 1004
Celotex Corp. *v.* Edwards 1105
Central Bank of Denver *v.* First Interstate Bank of Denver 164
Central Community Hospital; Jurcev *v.* 1081
Chahine *v.* United States 1146
Chambers *v.* Texas 1100
Chamness *v.* Federal Deposit Ins. Corp. 1127
Chandler *v.* Dallas 1011
Chang *v.* United States 1148
Chapman, *In re* 1028,1125
Chase *v.* California 1086
Chen *v.* United States 1039
Chertoff; Gaydos *v.* 1087
Chesapeake & Potomac Telephone Co. of Va.; Copeland *v.* 1064
Cheslerean *v.* Immigration and Naturalization Service 1004
Chesney *v.* United States 1025
Chevron Corp. Long-Term Disability Plan; Marte *v.* 1032
Chevron, U. S. A., Inc.; Radford *v.* 1012
Chiasson; Zapata Gulf Marine Corp. *v.* 1029
Chicago; Balark *v.* 1082
Chicago *v.* Environmental Defense Fund 328
Chicago; Evans *v.* 1082

	Page
Chicago; Graff *v.*	1085
Chicago *v.* Great Lakes Dredge & Dock Co.	1140
Chicago; Wilson *v.*	1088
Chicago Truck Drivers Pension Fund *v.* Slotky	1018
Children's Memorial Hospital; Young In Hong *v.*	1005
Childs *v.* United States	1011
Chiles; Attwood *v.*	1088
Chiles; Stewart *v.*	1048
Chilton *v.* Murray	1023
Choi *v.* Parmet	1145
Choudhary *v.* Vermont Dept. of Public Service	1133
Christeson *v.* Groose	1086
Christiansen *v.* Smith	1034
Chrysler Motors Corp.; Snelling *v.*	1079
Chu *v.* United States	1035
Churchill; Waters *v.*	661
Cigna Securities, Inc.; Dodds *v.*	1019
Cinel *v.* Louisiana	1018
Ciprano *v.* United States	1045
Citgo Petroleum Corp.; Authement *v.*	1019
City. See name of city.	
Civil Service Comm'n; Sweeney *v.*	1007,1102
Clair; Calderon *v.*	1080
Clark *v.* Baltimore Municipal Golf Corp.	1107
Clark *v.* California	1087
Clark; Sullivan *v.*	1039
Clark *v.* United States	1025
Clark County; Mosley *v.*	1064
Clarkstown; C & A Carbone, Inc. *v.*	383
Clay *v.* Murray	1055
Clay *v.* United States	1134
Clay; United States *v.*	1011
Clemons *v.* Arvonio	1148
Clemons *v.* Morton	1131
Cleveland *v.* Arkansas	1080
Clewis *v.* Krivanek	1030
Clifton *v.* Vaughn	1040
Clinton *v.* Smith	1091
Cloutier, *In re*	1125
Cobb *v.* United States	1036
Cobb County *v.* Harvey	1129
Coble *v.* United States	1006
Cochran *v.* Murray	1075
Cockrell *v.* United States	1093,1148

Page
Code *v.* Louisiana 1100
Cody; Cotner *v.* 1133
Cody; Gassaway *v.* 1007
Cody; Hawkins *v.* 1022
Cole *v.* United States 1148
Colello *v.* United States 1135
Collins; Anderson *v.* 1064,1065
Collins; Beavers *v.* 1014
Collins; Dillard *v.* 1009
Collins; Harper *v.* 1009
Collins; Hinkle *v.* 1020
Collins; Hozdish *v.* 1089
Collins; Kennedy *v.* 1038
Collins; Kuykendall *v.* 1048
Collins; Mosley *v.* 1008
Collins; Nethery *v.* 1026
Collins; Reich *v.* 1067
Collins; Rougeau *v.* 1078
Collins; Simmons *v.* 1073
Collins; Stribling *v.* 1101
Collins *v.* Thompson 1127
Collins *v.* United States 1086,1095
Collins; Webb *v.* 1013
Collins Licensing *v.* American Telephone & Telegraph Co. 1137
Colorado; Black *v.* 1109
Colorado; Esnault *v.* 1133
Colorado *v.* LaFrankie 1077
Colorado *v.* Leftwich 1139
Colorado Dept. of Health *v.* Bauman 1004
Colorado Territorial Correctional Facility; Makin *v.* 1131
Columbia Presbyterian Medical Center; Lawrence *v.* 1070
Columbia Resource Co. *v.* Environmental Quality Comm'n of Ore. 93
Colvin *v.* United States 1113
Comer *v.* Arizona 1026
Comici, *In re* 1104
Commissioner; Haley *v.* 1030
Commissioner; Larner *v.* 1148
Commissioner; Purificato *v.* 1018
Commissioner; Rogers *v.* 1019
Commissioner, New York State Dept. of Tax. and Fin.; Henry *v.* 1126
Commissioner of Ins. of La.; Third National Bank of Nashville *v.* 1082
Commissioner of Internal Revenue. See Commissioner.
Commissioner of Social Service of N. Y. C.; Abidekun *v.* 1064
Commissioner of Transportation of Conn.; Westchester County *v.* 1107

Page
Committee of Receivers for A. W. Galadari; Drexel Burnham Lambert Group Inc. *v.* 1069
Committee of Receivers for A. W. Galadari; Refco, Inc. *v.* 1069
Commonwealth. See also name of Commonwealth.
Commonwealth Edison Co.; Bush *v.* 1071
Community Consol. School Dist. 21 of Wheeling Twp.; Sherman *v.* 1110
Community Mut. Ins. Co.; Tiemeyer *v.* 1005
Compton; Thandiwe *v.* 1132
Comptroller of Currency *v.* Variable Annuity Life Ins. Co. 1141
Conaway, *In re* 1002
Conboy *v.* Bureau of National Affairs, Inc. 1076
Condon *v.* Delaware 1008,1079
Confecciones Zuny Ltda. *v.* United States 1030
Conklin *v.* Zant 1100
Conn *v.* Wells 1135
Connell; Crawford *v.* 1073
Connick; Bernard *v.* 1005
Conroy, *In re* 1139
Consiglio *v.* California 1075
Constant *v.* Advanced Micro-Devices, Inc. 1084
Constant *v.* Wilson 1033
Consumer Protection Division; Edmond *v.* 1124
Contreras *v.* California 1024
Contreras *v.* New York 1040
Contreras-Subias *v.* United States 1109
Convertino *v.* Wright 1018
Conyers Community Church, Inc. *v.* Stevens 1053
Cooper, *In re* 1016,1103
Copeland *v.* Chesapeake & Potomac Telephone Co. of Va. 1064
Copeland; Grote *v.* 1134
Copeland *v.* Lomen 1074
Coral *v.* Alabama 1012
Corethers, *In re* 1003
Corethers *v.* Friedman 1009
Corethers *v.* Fuerst 1092
Corethers *v.* Kmiecik 1012
Corn *v.* Lauderdale Lakes 1018
Cornejo *v.* California 1090
Cornellier *v.* Avenenti 1057
Corrections Commissioner. See name of commissioner.
Correll *v.* United States 1011
Corugedo *v.* United States 1145
Coscia *v.* United States 1057
Costa; Ulyas *v.* 1032

	Page
Costanz *v.* United States	1019
Cotner *v.* Cody	1133
Cotter & Co. *v.* Brizendine	1103
Cotton *v.* Kansas	1101
Coughlin; Epps *v.*	1023
County. See name of county.	
Cowan *v.* Montana	1005
Cox *v.* United States	1127
Cozad *v.* United States	1071
Craig *v.* United States	1019
Cramer *v.* LeCureux	1050
Crawford *v.* Connell	1073
Crawford; Dingle *v.*	1055
Crawford; Ratelle *v.*	1081
Crockett *v.* Oregon	1075
Crook *v.* United States	1086
Crosby; Ramsey *v.*	1054
Crosetto *v.* State Bar of Wis.	1129
Croskey *v.* United States	1075
Cross; Bardson *v.*	1074
Crowell *v.* United States	1109
Cruz-Moreno *v.* United States	1058
Cuevas *v.* United States	1096
Cuie *v.* United States	1021
Cullen, *In re*	1001
Culp *v.* United States	1110
Culver *v.* California	1006
Cummings *v.* California	1046
Cummins *v.* California	1073
Cuomo *v.* Travelers Ins. Co.	1067
Curcio *v.* United States	1076
Cureton *v.* Mitchell	1093
Custis *v.* United States	485
Cuthbert; Parris *v.*	1064
Dahlman *v.* United States	1045
Daleske *v.* Fairfield Communities, Inc.	1082
Dallas; Chandler *v.*	1011
Dallas County Ed. Dist.; Gibson *v.*	1018
Dalton *v.* Specter	462
D'Amario *v.* O'Neil	1111
Daniels *v.* United States	1054
Danilov *v.* Pennsylvania	1038
Danzey *v.* United States	1020
Dauphin County; Shoop *v.*	1088

Page
David *v.* Hudacs 1124
Davidson; Guerrero *v.* 1047
Davidson *v.* United States 1025
Davies *v.* United States 1129
Davilla *v.* California 1088
Davis *v.* Arkansas 1026
Davis *v.* Davis 1142
Davis; L. A. E. *v.* 1054
Davis *v.* Minnesota 1115
Davis *v.* Ohio 1075
Davis *v.* Resolution Trust Corp. 1006
Davis Supermarkets, Inc. *v.* National Labor Relations Bd. 1003
Day *v.* United States 1130
Deane *v.* Smith 1093
Dear; Friedman *v.* 1007
Debevoise; Thakkar *v.* 1013
DeBruyn; Rasheed-Bey *v.* 1019
DeBruyn; Willis *v.* 1005
Deco Records; Kelly *v.* 1093
DeeBees; Asgrow Seed Co. *v.* 1029
Delaware; Condon *v.* 1008,1079
Delaware *v.* New York 1028
DeLemos *v.* United States 1038
Delo; Schlup *v.* 1003
Delo; Scott *v.* 1091
Deloitte, Haskins & Sells; Heritage Capital Corp. *v.* 1051
Delph *v.* International Paper 1048
De Maio *v.* Brown 1126
Dempsey *v.* Rangaire Corp. 1092
DeNooyer *v.* Livonia Public Schools 1031
Dentists Ins. Co.; Berg *v.* 1032
Denver; Casados *v.* 1005
Denver; Snell *v.* 1138
Department of Air Force; Bacon *v.* 1043
Department of Corrections; Lyle *v.* 1149
Department of Defense; Atamantyk *v.* 1113
Department of Env. Conservation; Simpson Paper (Vt.) Co. *v.* 1141
Department of Env. Quality of Ore.; Oregon Waste Systems, Inc. *v.* 93
Department of Navy; Price *v.* 1144
Department of Navy; Rubinstein *v.* 1024
Department of Revenue of Mont. *v.* Kurth Ranch 767
Department of Social Services; Shanteau *v.* 1008,1102
Department of Treasury; Jackson *v.* 1144
Department of Treasury; Klimas *v.* 1147

Page
Department of Veterans Affairs; Traunig *v.* 1044
Department of Water Supply/Maui County; Reiskin *v.* 1084
Derdeyn; University of Colo. *v.* 1070
DeRewal *v.* United States 1033
Desfonds *v.* Massachusetts 1043
Desktop Direct, Inc.; Digital Equipment Corp. *v.* 863
Des Moines; Picray *v.* 1085
Desmond *v.* Haldane 1133
DeWitt *v.* United States 1041
DeWitt; Ventetoulo *v.* 1032
Diaz *v.* Government of Virgin Islands 1114
Diaz *v.* United States 1059
Diaz del Castillo *v.* Aeroservice Aviation Center, Inc. 1082
Diaz-Rosas *v.* United States 1089
DiCicco *v.* Tremblay 1026
Dick *v.* Peters 1056
Dickinson *v.* Ohio Bell Communications, Inc. 1068
DiDomenico *v.* Berk 1081
DiFranco *v.* United States 1033
Digital Equipment Corp. *v.* Desktop Direct, Inc. 863
Dillard *v.* Collins 1009
Dingle *v.* Crawford 1055
Dingle *v.* United States 1131
Diocese of Colo. *v.* Moses 1137
Diocese of Colo. *v.* Tenantry 1137
DiPinto *v.* Sperling 1082
Directo *v.* California 1088
Director, OWCP *v.* Greenwich Collieries 1028
Director, OWCP *v.* Maher Terminals, Inc. 1029
Director, OWCP; Munguia *v.* 1086
Director of penal or correctional institution. See name or title of director.
Director of Revenue of Mo.; Associated Industries of Mo. *v.* 641
District Court. See U. S. District Court.
District Judge. See U. S. District Judge.
District of Columbia; B. S. *v.* 1072
District of Columbia *v.* Kattan 1018
District of Columbia; Murray *v.* 1038
District of Columbia; Preuss *v.* 1008
Dixon; Lawson *v.* 1013
Dizon *v.* United States 1114
Dober *v.* California 1038
Dobson; Allied-Bruce Terminix Cos. *v.* 1140
Doctor *v.* Pennsylvania 1132

Page
Dodds *v.* Cigna Securities, Inc. 1019
Doe *v.* Tullahoma City Schools Bd. of Ed. 1108
Dolan *v.* Tigard 1016
Donahue; Anonsen *v.* 1128
Donoghue; Whitman *v.* 1108
Dorado *v.* Maryland 1092
Dougharty *v.* United States 1106
Douglas *v.* California 1038
Douglas Dynamics, Inc.; Hayes *v.* 1126
Douglas VanDyke Coal Co.; VanDyke *v.* 1078
Dow Chemical U. S. A.; Lacey *v.* 1068
Dow Co.; Lacey *v.* 1068
Dowell *v.* Wright 1077
Downtown Frankfort, Inc. *v.* Capital Area Right to Life, Inc. 1126
Downtown Frankfort, Inc.; Capital Area Right to Life, Inc. *v.* 1135
Doyle *v.* Florida 1007
Draper *v.* Gunn 1111
Dressler; Hunter *v.* 1039
Dressler *v.* Wisconsin 1114
Drexel Burnham Lambert Group *v.* Comm. of Receivers for Galadari 1069
Dreyfus Corp. *v.* Ebanks 1019
Driesse *v.* United States 1076
Drury *v.* United States 1044
Duarte Otero *v.* United States 1058
Dubois *v.* Virginia 1012
Dubow, *In re* 1066
Dubuque Packing Co. *v.* Food & Commercial Workers 1016,1067,1138
Duffey *v.* Abbott 1091
Duffey *v.* Oklahoma 1040
Duffy; Barth *v.* 1030
Dukovich *v.* United States 1111
Dunbar *v.* United States 1087
Duncan *v.* Strange 1034
Dunham *v.* United States 1086
Dunlap *v.* California 1087
Dunn *v.* Regents of Univ. of Cal. 1090
Dunn *v.* United States 1035
Dunne *v.* Keohane 1149
Dupard *v.* Jarvis 1109
DuPont *v.* United States 1130
Dupree *v.* United States 1044
Durbin *v.* Durbin 1143
Duvall *v.* Administrator, Eastern Pa. Psychiatric Institute 1074

	Page
Dyer *v.* California	1038
E. *v.* Davis	1054
Eagleye *v.* TRW, Inc.	1004
Eastman Kodak Co.; French *v.*	1019
Eastman Kodak Co.; FutureGraphics, Ltd. *v.*	1019
Eau Claire County; Gamble *v.*	1047
Ebanks; Louis Dreyfus Corp. *v.*	1019
Eberhardt; Shelton *v.*	1007
Eddy *v.* United States	1077
Edmond *v.* Consumer Protection Division	1124
Edsall *v.* United States	1130
Edwards; Celotex Corp. *v.*	1105
Edwards *v.* Illinois	1071
Edwards; Northbrook Property & Casualty Ins. Co. *v.*	1103
Edwards *v.* Phoebe Putney Memorial Hospital	1039
Edwards; Recall '92, Inc. *v.*	1017
Edwards; Todd Shipyards Corp. *v.*	1031
Edwards *v.* United States	1020
Edwards *v.* Wilson	1006
EGB Associates, Inc. *v.* TCBY Systems, Inc.	1108
Ejay Travel, Inc. *v.* Algemeen Burgerlijk Pensioenfonds	1107
El *v.* United States	1006
Eldridge *v.* Johnson	1092
Electrical Workers *v.* Georgia Power Co.	1069
Eline *v.* Bishop Estate	1009
Elkins *v.* South Carolina	1063
Ellenbecker *v.* Howe	1005
Elliott *v.* United States	1130
El-Masri *v.* United States	1096
El San Hotel & Casino; Kagan *v.*	1005
Elzaatari *v.* United States	1059
Employers Underwriters, Inc. *v.* Weaver	1129
Encore Systems, Inc. *v.* Ladney	1053
Ennis Police Dept.; Franklin *v.*	1111
Environmental Defense Fund; Chicago *v.*	328
Environmental Quality Comm'n of Ore.; Columbia Resource Co. *v.*	93
Epps *v.* Coughlin	1023
Erdheim, *In re*	1027
Erwin, *In re*	1048
Erwin *v.* U. S. District Court	1025,1153
Escambia County Sheriff; Payne *v.*	1111
Esnault *v.* Colorado	1133
Esparza *v.* Parole Panel	1007
Esparza *v.* Woods	1007

Page
Espinal *v.* United States 1133
Espinosa *v.* Florida 1152
Estelle; Potillor *v.* 1131
Estelle; Shelton *v.* 1055
Estes *v.* Van der Veur 1021,1102
Estrada *v.* Gomez 1055
Evans; Arizona *v.* 1126
Evans *v.* Chicago 1082
Evans; Makin *v.* 1082
Evans & Sons; Polyak *v.* 1053
Evatt; Adams *v.* 1001
Evin; Ray *v.* 1110
Ewell *v.* Murray 1111
Exxon Co. U. S. A.; Meggers *v.* 1084
Fairfax County School Bd. *v.* Fairfax Covenant Church 1143
Fairfax Covenant Church; Fairfax County School Bd. *v.* 1143
Fairfield Communities, Inc.; Daleske *v.* 1082
Fairley; Burnett *v.* 1132
Falconer *v.* United States 1044
Falin *v.* Shalala 1036
Farhat, *In re* 1104
Farmer *v.* Brennan 825
Farmers Home Admin.; Parkridge Investors Ltd. Partnership *v.* 1142
Farmers Ins. Exchange; Ruscitti *v.* 1107
Farmers State Bank; Lightle *v.* 1047
Fassnacht *v.* Philadelphia 1129
Faust *v.* United States 1047
Favorito *v.* United States 1006
Favors *v.* California 1091
Federacion de Maestros de Puerto Rico *v.* P. R. Labor Rel. Bd. . . 1069
Federal Bureau of Investigation; Bucksa *v.* 1041
Federal Communications Comm'n; Branton *v.* 1052
Federal Communications Comm'n; Cellswitch L. P. *v.* 1004
Federal Deposit Ins. Corp.; Chamness *v.* 1127
Federal Deposit Ins. Corp.; Kuehl *v.* 1034
Federal Deposit Ins. Corp.; Robinson *v.* 1031
Federal Government; Phelps *v.* 1114
Feige, *In re* 1125
Ferrell *v.* United States 1059
Fiallo *v.* United States 1113
Fierro-Gaxiola *v.* United States 1147
15th Judicial District Court; Ledet *v.* 1091
Figueroa *v.* California 1008
Figueroa *v.* United States 1030

Page
Filios *v.* Massachusetts Comm'r of Revenue 1030
Financial Security Assurance, Inc.; T–H New Orleans Ltd. Partnership *v.* 1083
Fire Thunder *v.* United States 1036
First Interstate Bank of Denver; Central Bank of Denver *v.* 164
First National Bank of Shamrock; Vaughan *v.* 1127
Fischl *v.* United States 1053
Fitzgerald *v.* Montana Dept. of Family Services 1032,1138
Fitzherbert *v.* United States 1059
Flack *v.* California 1018
Flannigan; Sullivan *v.* 1007
Flint; Reid *v.* 1091
Flores *v.* California 1090
Flores-Martinez *v.* United States 1144
Florida; Arbelaez *v.* 1115
Florida; Atwater *v.* 1046
Florida; Bain *v.* 1132
Florida; Beltran-Lopez *v.* 1115
Florida; Doyle *v.* 1007
Florida; Espinosa *v.* 1152
Florida; Garcia *v.* 1009
Florida; Grieco *v.* 1093
Florida *v.* Pough 1052
Florida; Randall *v.* 1040
Florida; Stewart *v.* 1049,1050
Florida; Toy *v.* 1111
Florida Dept. of Health and Rehabilitative Services; Gheith *v.* . . 1056
Florida Dept. of Health and Rehabilitative Services; Keegan *v.* . . 1064
Florida Power Corp.; Martin *v.* 1053
Florida Power & Light Co.; Boca Grande Club, Inc. *v.* 222
Florida Supreme Court; Graham *v.* 1047
Flowers *v.* Gudmanson 1132
Flowers *v.* Jordan 1145
Flowers *v.* United States 1043
Floyd *v.* United States 1145
Floyd West & Co.; Newsome *v.* 1079
Flynn *v.* B&T Towing 1010,1102
Flynn *v.* Garden City 1010,1102
Font *v.* United States 1149
Fonville *v.* United States 1086
Food & Commercial Workers; Dubuque Packing Co. *v.* . . 1016,1067,1138
Ford *v.* Alabama 1078
Forestwood Farms, Inc. *v.* National Labor Relations Bd. 1108
Forrest *v.* United States 1113

	Page
Forster *v.* New Hampshire	1093
Forsyth County; Nationalist Movement *v.*	1033
Fortin *v.* Roman Catholic Bishop of Worcester	1142
Foster; Kehs *v.*	1107
Fouche *v.* United States	1020
Fox *v.* United States	1077
Foxworth *v.* United States	1025
Franco; New Mexico Environment Dept. *v.*	1005
Franklin *v.* Ennis Police Dept.	1111
Franklin *v.* Lummis	1148
Franklin *v.* Michigan	1101
Fredette *v.* United States	1114
Freeman *v.* Idaho Comm'n for Pardons and Parole	1011
Freeman *v.* United States	1077,1134
French *v.* Eastman Kodak Co.	1019
Fresco, *In re*	1016
Friedman; Corethers *v.*	1009
Friedman *v.* Dear	1007
Fromal *v.* Robins	1133
Fromal *v.* Virginia State Bar Disciplinary Bd.	1090
Frushon *v.* United States	1147
Fuentes *v.* United States	1033
Fuerst; Corethers *v.*	1092
Fuller *v.* Norfolk Southern Corp.	1015
Fullwood *v.* United States	1095
Fultz *v.* United States	1077
Furman *v.* United States	1059
FutureGraphics, Ltd. *v.* Eastman Kodak Co.	1019
Gacy *v.* Page	1079
Gainer *v.* Symington	1073
Gaines; Whitmore *v.*	1079
Galbraith *v.* United States	1060
Galeano *v.* United States	1025
Gallardo *v.* United States	1010
Gallodoro *v.* State Farm Mut. Automobile Ins. Co.	1070
Galloway *v.* Thurman	1091
Gamble *v.* Eau Claire County	1047
Ganjoo; Phillips *v.*	1021
Gannett Co.; Mojica *v.*	1069
Gant; Grand Lodge of Tex. (Ancient, Free, and Accepted Masons) *v.*	1083
Gant *v.* United States	1118
Garceau *v.* California	1139
Garcia *v.* California	1073
Garcia *v.* Florida	1009

Page

Garden City; Flynn *v.* 1010,1102
Gardner; Brown *v.* 1017
Garey *v.* Oh 1144
Garratt *v.* Morris 1004,1080
Garris *v.* United States 1025
Garvey Corp.; Security Services, Inc. *v.* 1106
Garza, Jure & King; Calvento *v.* 1055
Gassaway *v.* Cody 1007
Gaster *v.* Taylor 1008
Gately; Massachusetts *v.* 1082
Gates *v.* United States 1009
Gator Office Supply & Furniture, Inc.; Kleinschmidt *v.* 1101
Gaudreault *v.* United States 1078
Gay *v.* California 1046
Gay *v.* United States 1130
Gaydos *v.* Chertoff 1087
Gear *v.* California 1088
Geery *v.* U. S. District Court 1109
General Motors Corp.; McKnight *v.* 659
Genesee Hospital; Lambert *v.* 1052
George *v.* Murray 1152
Georgia; Moore *v.* 1074
Georgia; Moseley *v.* 1107
Georgia; Waugh *v.* 1090
Georgia Advocacy Office; McGuffey *v.* 1021
Georgia Dept. of Human Resources *ex rel.* Cassell; Tucker *v.* 1141
Georgia Power Co.; Electrical Workers *v.* 1069
Gepfrich *v.* Gepfrich 1052
Gerald *v.* United States 1144
Gergick *v.* Johnson 1029
Gersman *v.* Group Health Assn., Inc. 1068
Gheith *v.* Florida Dept. of Health and Rehabilitative Services 1056
Gholston *v.* United States 1035,1113
Gibbs *v.* United States 1042
Gibson *v.* Dallas County Ed. Dist. 1018
Gibson *v.* Macomber 1052
Gifford *v.* National Bank of S. D., Presho 1007
Giganti; Klutnick *v.* 1047
Gilbert-Bey *v.* United States 1128
Gill *v.* Vidmark, Inc. 1085
Gillis *v.* Hoechst Celanese Corp. 1004
Gillis; Hoechst Celanese Corp. *v.* 1003,1031
Gillis *v.* Maryland 1039
Gipson *v.* California 1112

Page

Glover *v.* McDonnell Douglas Corp. 1070

Goad *v.* Williams 1053

Godin *v.* New York 1131

Goins *v.* United States 1110

Golden Valley Microwave Foods, Inc. *v.* Weaver Popcorn Co. 1128

Goldman *v.* United States 1071

Goldstein *v.* United States 1033

Gomez *v.* California 1039

Gomez; Estrada *v.* 1055

Gomez *v.* Gomez 1133

Gomez; LaFlamme *v.* 1073

Gomez; Maciel *v.* 1112

Gomez; Spychala *v.* 1089

Gonzales *v.* Scott 1146

Gonzalez *v.* California 1073

Gonzalez *v.* Ocean County Bd. of Social Services 1078

Gonzalez *v.* United States 1132

Gonzalez-Balderas *v.* United States 1129

Gonzalez-Lerma *v.* United States 1095

Good *v.* Bowles 1039

Good *v.* United States 1095

Goolsby; Boyd *v.* 1107

Gorenfeld; Weber *v.* 1038

Gosch *v.* Texas 1046

Gotham Tower, Inc.; Broyde *v.* 1128

Gotti *v.* United States 1070

Government of Virgin Islands; Martinez Diaz *v.* 1114

Governor of Ariz.; Gainer *v.* 1073

Governor of Ark.; Askew *v.* 1023

Governor of Ark.; Pickens *v.* 1079

Governor of Fla.; Attwood *v.* 1088

Governor of Fla.; Stewart *v.* 1048

Governor of La.; Recall '92, Inc. *v.* 1017

Governor of N. Y. *v.* Travelers Ins. Co. 1067

Governor of Ohio, *In re* 1126

Grady *v.* Miami Herald Publishing Co. 1047

Graff *v.* Chicago 1085

Graham *v.* Butterworth 1128

Graham *v.* Florida Supreme Court 1047

Graham & Sons *v.* Bertrand 1070

Grajeda *v.* California 1086

Granderson; United States *v.* 39

Grand Lodge of Tex. (Ancient, Free, and Accepted Masons) *v.* Gant 1083

Grand Rapids; Warren *v.* 1101

Page
Grant *v.* Vaughn 1041
Graves *v.* United States 1081
Gray *v.* Tri-State Rubbish, Inc. 1106
Gray *v.* United States 1077
Grayson; Brinson *v.* 1055
Grayson; Lodge *v.* 1060
Great American Communications Co.; Tregenza *v.* 1085
Great American Ins. Co.; LeBlanc *v.* 1018
Greathouse *v.* United States 1035
Great Lakes Dredge & Dock Co.; Chicago *v.* 1140
Great Lakes Dredge & Dock Co.; Jerome B. Grubart, Inc. *v.* 1140
Greco *v.* Nelson 1112
Green; Hawkins *v.* 1093
Green *v.* Kuhlmann 1133
Green *v.* Roberts 1090
Greene *v.* Albemarle-Charlottesville Joint Security Complex 1089
Greenwich Collieries; Director, OWCP *v.* 1028
Greer *v.* Ohio 1015,1078
Gregg *v.* United States 1114
Grieco *v.* Florida 1093
Grieco *v.* Nelson 1112
Griffin, *In re* 1140
Griffith *v.* United States 1112
Grimes; McCampbell *v.* 1021
Grooms *v.* United States 1035
Groose; Christeson *v.* 1086
Groose; Shanz *v.* 1074
Gross *v.* Western-Southern Life Ins. Co. 1037
Grossman; Texas Commerce Bancshares, Inc. *v.* 1128
Grote *v.* Copeland 1134
Group Health Assn., Inc.; Gersman *v.* 1068
Grubart, Inc. *v.* Great Lakes Dredge & Dock Co. 1140
Guardian Life Ins. Co. of America; Kokkonen *v.* 375
Gudmanson; Flowers *v.* 1132
Guernsey Memorial Hospital; Shalala *v.* 1016
Guerrero *v.* Davidson 1047
Guillory; Sloan *v.* 1132
Gunn; Draper *v.* 1111
Gutierrez *v.* United Foods, Inc. 1142
Gutierrez-Amezquita *v.* United States 1148
Guzman *v.* Hudson 1108
Hagen *v.* Utah 1047
Haghighat-Jou *v.* United States 1042
Hain *v.* Oklahoma 1020

Page
Hain; Oklahoma *v.* 1025
Haldane; Desmond *v.* 1133
Hale *v.* United States 1071
Hale *v.* Via 1054
Haley *v.* Commissioner 1030
Hall; Camoscio *v.* 1107
Hall *v.* Hall 1107
Hall *v.* Martin 1018
Hall *v.* Melendez 1143
Hall *v.* United States 1135
Hallford *v.* Alabama 1100
Hamani *v.* Morton 1131
Hamilton, *In re* 1125
Hamilton; Polyak *v.* 1053
Hammons *v.* U. S. Railroad Retirement Bd. 1069
Hance *v.* Zant 1013
Hancock County Planning Comm'n; Yater *v.* 1019
Hando *v.* Shalala 1074
Hankerson *v.* United States 1114
Hankins *v.* California 1086
Hanson *v.* Passer 1094
Hanzy *v.* California 1056
Hargett; Benson *v.* 1047
Harland Co.; Security Services, Inc. *v.* 1106
Harper *v.* Collins 1009
Harper *v.* Harper 1108
Harris *v.* American Medical International, Inc. 1068
Harris *v.* Campbell 1101
Harris; Hoffman *v.* 1060
Harris *v.* Raemisch 1089
Harris *v.* Rocha 1039
Harris; Sears, Roebuck & Co. *v.* 1128
Harris *v.* United States 1095,1147
Harrod, *In re* 1027
Hart; Tornowski *v.* 1045
Hartsock *v.* Kentucky 1143
Harvey; Cobb County *v.* 1129
Harvey *v.* United States 1010
Harwood; Asam *v.* 1078
Hassan El *v.* United States 1006
Hawes; Boalbey *v.* 1138
Hawkins *v.* Cody 1022
Hawkins *v.* Green 1093
Hawley; Williams *v.* 1055,1131

Page
Hayden *v.* La-Z-Boy Chair Co. 1004
Hayes *v.* Douglas Dynamics, Inc. 1126
Hayes *v.* United States 1009,1020,1077
Haynes *v.* United States 1147
Hays *v.* United States 1024
Hayward *v.* United States 1004,1101
Hazzard *v.* Jones 1073
Hazzard *v.* Oakland 1073
Health Care & Retirement Corp. of America; NLRB *v.* 571
Hearron *v.* United States 1148
Hedges; A. J. Industries, Inc. *v.* 1127
Hedley; Ruchti *v.* 1088
Heilig *v.* United States 1115
Heiman, *In re* 1028
Heinz Co.; Silvey Refrigerated Carriers, Inc. *v.* 1106
Heitkamp; Lange *v.* 1131
Heitmann, *In re* 1002,1125
Henderson, *In re* 1027
Henderson *v.* Ohio 1015
Henderson; Starkey *v.* 1110
Henry *v.* Wetzler 1126
Henson *v.* Snyder 1040
Henthorn, *In re* 1140
Heritage Capital Corp. *v.* Deloitte, Haskins & Sells 1051
Hernandez *v.* United States 1042,1130
Hernandez *v.* White 1073
Herrera *v.* United States 1095,1148
Herrera-Duran *v.* United States 1146
Herring, *In re* 1103
Herring *v.* Meachum 1059
Hess *v.* Arizona 1149
Hess *v.* Port Authority Trans-Hudson Corp. 1067
Hester *v.* United States 1147
Hett *v.* Madison Mut. Ins. Co. 1133
Hicklin *v.* United States 1044
Hicks *v.* Baltimore Gas & Electric Co. 1102
Hicks *v.* Brown Group, Inc. 1068
Hicks *v.* Brown Shoe Co. 1068
Hicks *v.* Ohio 1015
Hilaire *v.* California 1039
Hill *v.* California 1133
Hill *v.* Ohio 1087
Hill *v.* United States 1001,1054
Hillary *v.* Trans World Airlines, Inc. 1128

Page
Hillburn *v.* California 1074
Hines *v.* Iowa Bd. of Psychology Examiners 1143
Hinkle *v.* Collins 1020
Hinton *v.* Pacific Enterprises 1083
H. J. Heinz Co.; Silvey Refrigerated Carriers, Inc. *v.* 1106
Hodge *v.* Idaho 1132
Hoechst Celanese Corp. *v.* Gillis 1003,1031
Hoeschst Celanese Corp.; Gillis *v.* 1004
Hoffman *v.* Harris 1060
Hoffman *v.* Idaho 1012
Hoffman; Northington *v.* 1038
Hoffman *v.* Webster County Sheriff's Dept., Marshfield 1092
Holland; McMillan *v.* 1013
Holland; Poole *v.* 1145
Hollawell *v.* Stepanik 1132
Holloway, *In re* 1030
Holly *v.* Brennan 1047,1152
Holman *v.* Illinois 1072
Holmes *v.* Norris 1063
Holmes *v.* Scott 1092
Holt *v.* Jones 1064
Holt *v.* Michigan Dept. of Corrections 1068
Holthaus *v.* United States 1024
Honda Motor Co. *v.* Oberg 1066
Honeycutt *v.* United States 1024
Hong *v.* Children's Memorial Hospital 1005
Honolulu Police Dept.; Logan *v.* 1074
Hood *v.* Smith 1009
Hooks *v.* Oklahoma 1100
Hord *v.* United States 1036
Hornback *v.* United States 1070,1152
Horning *v.* Ohio 1047
Horton *v.* North Carolina 1088
Hoskins *v.* California 1035
Hoskins *v.* Kinney 1033
Hospital Assn. of N. Y. *v.* Travelers Ins. Co. 1067
House of Raeford Farms, Inc. *v.* National Labor Relations Bd. 1030
Howard *v.* Nagle 1072
Howard *v.* United States 1090,1146
Howe; Ellenbecker *v.* 1005
Hozdish *v.* Collins 1089
Hua Chen *v.* United States 1039
Hudacs; David *v.* 1124
Hudson; Guzman *v.* 1108

Page
Hudson *v.* United States 1059
Huey *v.* Shalala 1068
Huffman *v.* United States 1146
Huggins *v.* United States 1094
Hughes *v.* Norfolk & Western R. Co. 1128
Hughes *v.* Texas 1152
Hughes *v.* White 1039
Huguley Memorial Seventh-day Adventist Med. Ctr.; Peterson *v.* 1068
Hulen; Polyak *v.* 1053
Hull *v.* United States 1094
Hulnick, *In re* 1002
Human, *In re* 1081
Human *v.* Santa Monica 1090
Humana, Inc.; Anderson *v.* 1027
Humphreys; Oklahoma *v.* 1077
Hunnewell *v.* United States 1054
Hunt, *In re* 1140
Hunt *v.* Murray 1021
Hunt *v.* United States 1149
Hunter; Brown-Brunson *v.* 1057
Hunter *v.* Dressler 1039
Hunter *v.* United States 1045
Hunter *v.* White 1091
Hunwardsen, *In re* 1126
Hurley *v.* New York 1094
Hust, *In re* 1139
Hutchinson *v.* Artuz 1041
Hutchinson *v.* United States 1042
Ibarra-Arreola *v.* Nevada 1093
Idaho; Atkinson *v.* 1076
Idaho; Hodge *v.* 1132
Idaho; Hoffman *v.* 1012
Idaho; Stillwell *v.* 1056
Idaho Comm'n for Pardons and Parole; Freeman *v.* 1011
Ige *v.* United States 1047
Ikpoh *v.* Illinois 1089
Illinois; Allen *v.* 1075
Illinois; Brown *v.* 1038
Illinois; Edwards *v.* 1071
Illinois; Holman *v.* 1072
Illinois; Ikpoh *v.* 1089
Illinois; Jones *v.* 1012
Illinois; Nunnally *v.* 1008
Illinois; Towns *v.* 1115

Page

Immigration and Naturalization Service; Adesanya *v.* 1101

Immigration and Naturalization Service; Cheslerean *v.* 1004

Immigration and Naturalization Service; Jolivet *v.* 1041

Immigration and Naturalization Service; Katsis *v.* 1118

Immigration and Naturalization Service; Stone *v.* 1105

Immigration and Naturalization Service; White *v.* 1141

Indiana; Manns *v.* 1055

Indiana; Smith *v.* 1063

Indiana Bell Telephone Co.; Luddington *v.* 1068

Infante; Magula *v.* 1008

In Hong *v.* Children's Memorial Hospital 1005

Innie *v.* United States 1042

In re. See name of party.

International. For labor union, see name of trade.

International Paper; Delph *v.* 1048

Interstate Commerce Comm'n *v.* Overland Express, Inc. 1103

Interstate Commerce Comm'n *v.* Transcon Lines 1029,1105

Interstate Independent Corp. *v.* Ohio *ex rel.* Roszmann 1084

Inverness; Rogers *v.* 1107

Iowa; Leeps *v.* 1042

Iowa; McKnight *v.* 1113

Iowa; Neyens *v.* 1060

Iowa Bd. of Psychology Examiners; Hines *v.* 1143

Iowa Bd. of Psychology Examiners; McMaster *v.* 1143

Iowa District Court for Jones County; Backstrom *v.* 1042

Irvine; United States *v.* 224

Israel *v.* U. S. District Court 1110

Istvan *v.* Willoughby of Chevy Chase Condo. Council of Owners 1037

Iverson *v.* Weeks 1030

Ivimey *v.* American Bank of Conn. 1064

Jackson *v.* Department of Treasury 1144

Jackson *v.* New York City Police Dept. 1004

Jackson *v.* Reno 1094

Jackson *v.* United States 1114,1130,1145

Jackson *v.* Wisneski 1012

Jacobs; Board of Governors of Registered Dentists of Okla. *v.* 1082

Jacobson *v.* United States 1069

J. Alexander Securities, Inc. *v.* Mendez 1150

James, *In re* 1105

James *v.* United States 1042,1047

James Island Public Service Dist.; Siegel *v.* 1053,1152

Jamison *v.* Ohio 1015

Jarmusik *v.* Merit Systems Protection Bd. 1143

Jarvis; Dupard *v.* 1109

	Page
J. E. B. *v.* Alabama *ex rel.* T. B.	127
Jefferson *v.* Zant	1046
Jeffress *v.* Brown	1112
Jenkins *v.* Alabama	1012
Jenkins; Long *v.*	1007
Jenkins *v.* United States	1034
Jerome B. Grubart, Inc. *v.* Great Lakes Dredge & Dock Co.	1140
Jimenez *v.* MGM	1022
Jimenez *v.* United States	1024
John E. Graham & Sons *v.* Bertrand	1070
John H. Harland Co.; Security Services, Inc. *v.*	1106
Johnson, *In re*	1002
Johnson; Calderon *v.*	1085
Johnson *v.* California	1013,1088
Johnson; Eldridge *v.*	1092
Johnson; Gergick *v.*	1029
Johnson *v.* Johnson	1003,1105
Johnson *v.* Mann	1132
Johnson *v.* Methodist Medical Center of Ill.	1107
Johnson *v.* Scott	1146
Johnson *v.* Senkowski	1037
Johnson *v.* Stinson	1037
Johnson; Taylor *v.*	1044,1153
Johnson *v.* Texas	1046
Johnson *v.* Uncle Ben's, Inc.	1068
Johnson *v.* United States	1036,1042,1095,1129,1130
Johnston *v.* United States	1036
Jolivet *v.* Immigration and Naturalization Service	1041
Jones, *In re*	1068
Jones; Hazzard *v.*	1073
Jones; Holt *v.*	1064
Jones *v.* Illinois	1012
Jones *v.* Merit Systems Protection Bd.	1076
Jones; Nelson *v.*	1020,1138
Jones *v.* Snyder	1009
Jones; Townley *v.*	1131
Jones *v.* United States	368,1129,1144
Jones; Walker *v.*	1111
Jordan *v.* Alabama	1112
Jordan; Flowers *v.*	1145
Jordan *v.* United States	1092
Joseph *v.* Whitley	1039
Journal Communications; Kotas *v.*	1093
Juarez *v.* California	1080

Page
Judge, Circuit Court of Mo., St. Louis County; Harris *v.* . . . 1101
Juno Beach; Karatinos *v.* . . . 1127
Jurcev *v.* Central Community Hospital . . . 1081
Kagan *v.* El San Hotel & Casino . . . 1005
Kahn *v.* Virginia Retirement System . . . 1083
Kaiser Foundation Health Plan, Inc.; Samura *v.* . . . 1084
Kalakay *v.* Newblatt . . . 1079
Kamienski *v.* New Jersey . . . 1108
Kansas; Cotton *v.* . . . 1101
Kansas; Van Winkle *v.* . . . 1144
Kansas City; Sanders *v.* . . . 1052
Kansas Public Employees Ret. Sys. *v.* Reimer & Koger Assoc. . . 1126
Kanu *v.* United States . . . 1113
Kaplan *v.* United States . . . 1113
Karatinos *v.* Juno Beach . . . 1127
Karim-Panahi *v.* California Dept. of Transportation . . . 1048
Karim-Panahi *v.* United States . . . 1109
Katsis *v.* Immigration and Naturalization Service . . . 1118
Kattan; District of Columbia *v.* . . . 1018
Keane; Winkler *v.* . . . 1022
Kee *v.* Provident Life & Accident Ins. Co. . . . 1084
Keegan *v.* Florida Dept. of Health and Rehabilitative Services . . 1064
Keeper *v.* United States . . . 1010
Kehs *v.* Foster . . . 1107
Kellogg Co.; Arnett *v.* . . . 1040
Kellom *v.* Shelley . . . 1020
Kelly *v.* Deco Records . . . 1093
Kelly *v.* Municipal Court of Cal., San Mateo County . . . 1009
Kelly *v.* United States . . . 1113
Kennedy *v.* Collins . . . 1038
Kennedy *v.* Little . . . 1012
Kennedy *v.* Nebraska . . . 1038
Kennedy *v.* Scott . . . 1118
Kennedy *v.* United States . . . 1059
Kennemore *v.* United States . . . 1094
Kentucky; Hartstock *v.* . . . 1143
Kenzie; Mack *v.* . . . 1009
Keohane; Dunne *v.* . . . 1149
Kerr *v.* United States . . . 1060
Key Enterprises of Del., Inc.; Sammett Corp. *v.* . . . 1126
Key Tronic Corp. *v.* United States . . . 809
Kibbe *v.* California . . . 1021
Kidd *v.* United States . . . 1059,1069
Kiem Tran *v.* United States . . . 1048

Page
Killeen; Poole *v.* 1101
Kilpatrick; Platsky *v.* 1021
Kim *v.* Reich 1064
King *v.* California 1035
King *v.* Texas 1133
Kinney; Hoskins *v.* 1033
Kirk; Light *v.* 1008,1138
Kish; Burchill *v.* 1006,1101
Klein, *In re* 1051
Kleinschmidt *v.* Gator Office Supply & Furniture, Inc. 1101
Kleinschmidt *v.* Liberty Mut. Ins. Co. 1112
Klimas *v.* Department of Treasury 1147
Klutnick *v.* Giganti 1047
Kmart Corp.; Security Services, Inc. *v.* 431
Kmiecik; Corethers *v.* 1012
Kodak Co.; French *v.* 1019
Kodak Co.; FutureGraphics, Ltd. *v.* 1019
Koelker *v.* Koelker 1082
Koff *v.* United States 1030
Kokkonen *v.* Guardian Life Ins. Co. of America 375
Kole, *In re* 1002
Kong Yin Chu *v.* United States 1035
Koprowski, *In re* 1002
Kost *v.* United States 1015
Kotas *v.* Journal Communications 1093
Kowalczyk *v.* Thompson 1109
Kramer *v.* United States 1059
Krasner, *In re* 1027
Kreuzhage *v.* United States 1010
Krivanek; Clewis *v.* 1030
Krohn, *In re* 1002
Kroner; Caldwell *v.* 1024
Krug *v.* Ambrose, Wilson, Grimm & Durand 1108
Kuehl *v.* Federal Deposit Ins. Corp. 1034
Kuhlmann; Green *v.* 1133
Kukes, *In re* 1153
Kukes *v.* Calderon 1093
Kuono, *In re* 1064
Kurth Ranch; Department of Revenue of Mont. *v.* 767
Kuykendall *v.* Collins 1048
Kyles *v.* Whitley 1051,1125
Laan *v.* California 1102
Labor Union. See name of trade.
LaBoy *v.* Pucinski 1022

	Page
Lacey *v.* Dow Chemical U. S. A.	1068
Lacey *v.* Dow Co.	1068
Ladney; Encore Systems, Inc. *v.*	1053
L. A. E. *v.* Davis	1054
Laessig *v.* Pennsylvania	1089
LaFlamme *v.* Gomez	1073
LaFrankie; Colorado *v.*	1077
Laird *v.* Pizzulli	1091
Lake County; Seagrave *v.*	1092
Lamb *v.* Union Carbide Corp.	1107
Lambdin; Senich *v.*	1145
Lambert *v.* Genesee Hospital	1052
Lamberty *v.* Texas	1014
Lampkin; Vanover *v.*	1019
Lancaster Mennonite Conference; Cassell *v.*	1085
Landesberg *v.* U. S. Bankruptcy Court, Southern Dist. of N. Y.	1034
Landgraf *v.* USI Film Products	244
Landsdown *v.* Winters	1031
Lane *v.* United States	1058
Lange *v.* Heitkamp	1131
Lange *v.* Lange	1025
Langlinais *v.* Louisiana	1072
Lanham *v.* United States	1058
Lanham; Wilson *v.*	1074
Larner *v.* Commissioner	1148
La Rosa; Miller *v.*	1048
Larson; Wood *v.*	1089
Lashley *v.* Rocha	1090
Last Stand *v.* Perry	1141
Lauderdale Lakes; Corn *v.*	1018
Lawrence *v.* Columbia Presbyterian Medical Center	1070
Lawson *v.* Dixon	1013
Lawson *v.* United States	1086
Layne *v.* United States	1006
La-Z-Boy Chair Co.; Hayden *v.*	1004
LeBlanc *v.* Great American Ins. Co.	1018
LeBlanc *v.* Shalala	1113
Lebron *v.* National Railroad Passenger Corp.	1105
LeCureux; Cramer *v.*	1050
Ledden *v.* Stepanik	1039
Ledet *v.* 15th Judicial District Court	1091
Lee *v.* United States	1035,1113,1114
Lee; United States *v.*	1046
Leeper *v.* United States	1146

Page
Leeps *v.* Iowa 1042
LeFlore *v.* Marvel Entertainment Group 1081
Leftwich; Colorado *v.* 1139
Lejarde *v.* United States 1097
Lensing *v.* Arkansas Dept. of Human Services 1037
Lewin *v.* United States 1143
Lewis *v.* Blazak 1097
Lewis *v.* Cadle Co. II, Inc. 1053
Lewis *v.* Casey 1066
Lewis *v.* Maass 1087
Lewis *v.* Moyer 1038
Lewis *v.* Richmond City Police Dept. 1023
Lewis *v.* United States 1111
Lewis; Voight *v.* 1112
Liberty Mut. Ins. Co.; Kleinschmidt *v.* 1112
Licon-Hernandez *v.* United States 1021
Light *v.* Kirk 1008,1138
Lightle *v.* Farmers State Bank 1047
Limones *v.* United States 1041
Lipovsky *v.* Carter 1019
Little; Kennedy *v.* 1012
Little *v.* United States 1043
Livadas *v.* Aubry 1016,1028
Livonia Public Schools; DeNooyer *v.* 1031
Llerena-Acosta *v.* United States 1011
Loa *v.* Akaka 1070
Local. For labor union, see name of trade.
LoCascio *v.* United States 1070
Lockhart; Middleton *v.* 1131
Lockheed Missiles & Space Co.; Phelps *v.* 1012
Lockley; Allen *v.* 1087
Lodeiro *v.* United States 1010
Lodge *v.* Grayson 1060
Loewenstein; Nebraska Dept. of Revenue *v.* 1104
Lofton *v.* California 1091
Logan *v.* Honolulu Police Dept. 1074
Lohman; Associated Industries of Mo. *v.* 641
Lomax *v.* Stepanik 1075
Lomen; Copeland *v.* 1074
Londoff, *In re* 1027
Long *v.* Jenkins 1007
Loomis *v.* Vernon 1143
Lopatin, Miller, et al., Attorneys at Law, P. C.; Baker *v.* 1056
Lopez *v.* Arizona 1046

Page
Lopez *v.* California 1110
Lopez *v.* United States 1043,1096
Lopez; United States *v.* 1029,1105
Lopez Gonzalez *v.* California 1073
Los Angeles *v.* Topanga Press, Inc. 1030
Loudermilk *v.* United States 1146
Louis Dreyfus Corp. *v.* Ebanks 1019
Louisiana; Cinel *v.* 1018
Louisiana; Code *v.* 1100
Louisiana; Langlinais *v.* 1072
Louisiana Dept. of Transportation and Development *v.* Wiedeman 1127
Louisiana Ins. Guaranty Assn.; Allstate Ins. Co. *v.* 1142
Louisiana State Univ.; Omoike *v.* 1138
Love; Snyder *v.* 1007
Lovejoy Specialty Hospital, Inc.; Advocates for Life, Inc. *v.* 1070
Lowery *v.* United States 1109
Lucas; Smith *v.* 1026
Lucero *v.* California 1111
Luckette *v.* Ryan 1076
Luddington *v.* Indiana Bell Telephone Co. 1068
Ludwig *v.* Variable Annuity Life Ins. Co. 1141
Lugo *v.* United States 1148
Lummi Indian Tribe *v.* Whatcom County 1066
Lummis; Franklin *v.* 1148
Luna County; Slesarik *v.* 1072
Lupe *v.* United States 1144
Lux *v.* Spotswood Construction Loans, L. P. 1011
Lyle *v.* Department of Corrections 1149
Lyle *v.* McKeon 1008,1102
Lyle *v.* Michigan Dept. of Corrections 1093
Lyle *v.* Richardson 1048
Lynn; Marshall *v.* 1020
Lysne *v.* United States 1042
Maass; Barquet *v.* 1022
Maass; Lewis *v.* 1087
Mabery *v.* Mann 1056
Maciel *v.* Gomez 1112
Mack *v.* Kenzie 1009
Mackey *v.* United States 1145
Macomber; Gibson *v.* 1052
Madera-Avila *v.* United States 1043
Madison *v.* Texas 1063
Madison Mut. Ins. Co.; Hett *v.* 1133
Madonia *v.* Blue Cross & Blue Shield of Va. 1019

	Page
Madsen, *In re*	1003,1102
Madsen *v.* Women's Health Center, Inc.	1016
Magnolia Court Apartments, Inc. *v.* Carlson	1084
Magula *v.* Infante	1008
Maher Terminals, Inc.; Director, OWCP *v.*	1029
Mahn *v.* United States	1134
Mahshie; Bseirani *v.*	1083
Maine Terminal College System; Winston *v.*	1069
Makin *v.* Colorado Territorial Correctional Facility	1131
Makin *v.* Evans	1082
Makinde *v.* United States	1043
Mala *v.* United States	1086
Maldonado *v.* United States	1118
Mancilla *v.* United States	1086
Manghan; Mangrum *v.*	1074
Mangrum *v.* Manghan	1074
Mann; Johnson *v.*	1132
Mann; Mabery *v.*	1056
Mann *v.* Oklahoma	1100
Mann; Razi-Bey *v.*	1132
Manns *v.* Indiana	1055
Mansfield *v.* United States	1052
Marek *v.* Singletary	1100
Mark *v.* United States	1144
Marroquin-Giron *v.* United States	1040
Marshall *v.* California	1091
Marshall *v.* Lynn	1020
Marshall *v.* United States	1058,1114
Marshall; Wright *v.*	1022,1102
Marte *v.* Chevron Corp. Long-Term Disability Plan	1032
Martin *v.* Florida Power Corp.	1053
Martin; Hall *v.*	1018
Martin *v.* Omega Medical Center Associates	1011
Martin *v.* Scott	1133
Martinez *v.* California	1145
Martinez; New York *v.*	1137
Martinez; Sanchez *v.*	1021
Martinez *v.* United States	1095
Martinez Diaz *v.* Government of Virgin Islands	1114
Martinez-Perez *v.* United States	1037
Marvel Entertainment Group; LeFlore *v.*	1081
Maryland; Baker *v.*	1078
Maryland; Dorado *v.*	1092
Maryland; Gillis *v.*	1039

	Page
Maryland; Roberson *v.*	1073
Mason *v.* Ohio	1138
Masri *v.* United States	1096
Massachusetts; Desfonds *v.*	1043
Massachusetts *v.* Gately	1082
Massachusetts Comm'r of Revenue; Filios *v.*	1030
Mata *v.* United States	1149
Matthews *v.* South Carolina	1138
Maxwell *v.* Arvonio	1110
Mayfield *v.* Michigan Bd. of Law Examiners	1147
Mayles *v.* United States	1045
Mayor of Dallas; Qutb *v.*	1127
Mazyck *v.* Smith	1037
McAninch; O'Neal *v.*	1017,1067
McCampbell *v.* Grimes	1021
McCaskey *v.* United States	1042
McClellan; Barreto *v.*	1096
McClendon *v.* California	1085
McClenny, *In re*	1028
McCombs *v.* Norris	1035
McConnell *v.* Armontrout	1101
McConnell *v.* United States	1059
McCowan *v.* United States	1010
McCummings *v.* Shalala	1032
McDermott, Inc. *v.* AmClyde	202
McDonald *v.* New Mexico	1125
McDonald *v.* United States	1034,1047
McDonnell Douglas Corp.; Glover *v.*	1070
McDonough *v.* Angelone	1088
McFail *v.* United States	1134
McGeough *v.* United States	1058
McGinnis; Van Sickle *v.*	1042
McGlocklin *v.* United States	1054
McGuffey *v.* Georgia Advocacy Office	1021
McHone *v.* North Carolina	1046
McKay *v.* United States	1113,1145
McKennon *v.* Nashville Banner Publishing Co.	1106
McKenzie *v.* United States	1054
McKeon; Lyle *v.*	1008,1102
McKinley *v.* United States	1036
McKnight *v.* General Motors Corp.	659
McKnight *v.* Iowa	1113
McMahon *v.* Bank of America N. T. & S. A.	1022
McMaster *v.* Iowa Bd. of Psychology Examiners	1143

Page
McMillan *v.* Holland 1013
McMurray *v.* California 1091
McMurtry *v.* Snyder 1037
McNamara, *In re* 1002
McNaron *v.* Brown 1108
McQueen *v.* United States 1010,1113
McReady *v.* Breeden 1025
McVay *v.* Parrish 1006
Meacham, *In re* 1027
Meachum; Herring *v.* 1059
Medical Engineering Corp. *v.* American Medical Systems, Inc. 1070
Medical Society of N. Y. *v.* Sobol 1152
Medina *v.* California 1111
Medlock; Pressley *v.* 1110
Meeks *v.* California 1110
Meggers *v.* Exxon Co. U. S. A. 1084
Meis *v.* Wyoming Dept. of Corrections 1072
Melendez; Hall *v.* 1143
Mena *v.* California 1109
Mendenhall *v.* Cedarapids, Inc. 1031
Mendez; J. Alexander Securities, Inc. *v.* 1150
Mendez *v.* United States 1115
Mendoza *v.* United States 1146
Mendoza-Lopez *v.* United States 1036
Merit Systems Protection Bd.; Jarmusik *v.* 1143
Merit Systems Protection Bd.; Jones *v.* 1076
Merlos *v.* United States 1064
Merrell Dow Pharmaceuticals; Rose *v.* 1040,1153
Merriweather *v.* Mitchell 1131
Messer *v.* United States 1096,1113
Messerschmidt *v.* United States 1010
Methodist Hospital *v.* Shalala 1142
Methodist Medical Center of Ill.; Johnson *v.* 1107
Metzger *v.* Berhanu 1106
Metzger *v.* United States 1006
Meuli *v.* United States 1020
Meyers; Wolfe *v.* 1057
Mezzanatto; United States *v.* 1029,1067
MGM; Jimenez *v.* 1022
Miami Herald Publishing Co.; Grady *v.* 1047
Miccio *v.* New Jersey Dept. of Community Affairs 1129
Michael Reese Hospital & Medical Center; Porter *v.* 1012
Michigan; Burgenmeyer *v.* 1045
Michigan; Franklin *v.* 1101

Page
Michigan; Mihalek *v.* 1096
Michigan Bd. of Law Examiners; Mayfield *v.* 1147
Michigan Dept. of Corrections; Holt *v.* 1068
Michigan Dept. of Corrections; Lyle *v.* 1093
Mickler *v.* Nimishillen & Tuscarawas R. Co. 1084
Micks, *In re* 1002
Middleton *v.* Lockhart 1131
Midwest Marine Contractor, Inc. *v.* Rufolo 1050
Mihalek *v.* Michigan 1096
Mihnovets *v.* Mihnovets 1070
Mikhail *v.* Railroad Retirement Bd. 1110
Millan *v.* United States 1006
Miller *v.* Arkansas 1128
Miller *v.* La Rosa 1048
Miller *v.* Rowland 1008
Miller *v.* United States 1025,1040
Miloslavsky *v.* United States 1053
Minh Trong *v.* California 1144
Minnesota; Davis *v.* 1115
Missouri; Cain *v.* 1086
Missouri; Ramsey *v.* 1078
Missouri Pacific R. Co. *v.* Tingstrom 1026,1083
Mitchell *v.* California 1145
Mitchell; Cureton *v.* 1093
Mitchell; Merriweather *v.* 1131
Mitchell *v.* Osborne 1112
Mitchell *v.* United States 1146
Mitchell Arms, Inc. *v.* United States 1106
Mobil Oil Corp.; Raymond *v.* 1013
Mock *v.* United States 1077
Moerman *v.* California 1031
Mojica *v.* Gannett Co. 1069
Molen *v.* United States 1071
Moley *v.* United States 1021
Molpus; Prewitt *v.* 1080
Monish *v.* United States 1023
Montalvo *v.* United States 1045,1147
Montana; Byers *v.* 1009
Montana; Cowan *v.* 1005
Montana; Van Haele *v.* 1144
Montana Dept. of Family Services; Fitzgerald *v.* 1032,1138
Montes-Mercado *v.* United States 1134
Montgomery *v.* Ohio 1015,1078
Moody; Attorney General of N. Y. *v.* 1084

Page
Moody *v.* Rivers 1088
Moore *v.* Georgia 1074
Moore *v.* United States 1054,1096
Moran *v.* Pennsylvania 1152
Moran *v.* United States 1023
Moreno *v.* Texas 1012
Morgan *v.* United States 1054,1057
Morgan Stanley & Co. *v.* Pacific Mut. Life Ins. Co. 658
Morin *v.* California 1091
Moringiello, *In re* 1104
Morris, *In re* 1027
Morris; Garratt *v.* 1004,1080
Morris; Watson *v.* 1021,1118
Morris County *v.* Philippen 1004
Morton; Clemons *v.* 1131
Morton; Hamani *v.* 1131
Mose; Diocese of Colo. *v.* 1137
Moseley *v.* Georgia 1107
Moses *v.* United States 1026
Mosley *v.* Clark County 1064
Mosley *v.* Collins 1008
Mostman, *In re* 1140
Moyer; Lewis *v.* 1038
Mulhollan *v.* United States 1010,1058
Mu'Min *v.* Murray 1026
Munguia *v.* Director, Office of Workers' Compensation Programs 1086
Municipal Court of Cal., San Mateo County; Kelly *v.* 1009
Munir *v.* Scott 1134
Munoz *v.* United States 1134
Murillo *v.* Tansy 1056
Murphy *v.* United States 1019,1118
Murphy; Weber *v.* 1097
Murphy *v.* Westchester County 1110
Murray; Chilton *v.* 1023
Murray; Clay *v.* 1055
Murray; Cochran *v.* 1075
Murray *v.* District of Columbia 1038
Murray; Ewell *v.* 1111
Murray; George *v.* 1152
Murray; Hunt *v.* 1021
Murray; Mu'Min *v.* 1026
Murray; Shackford *v.* 1056
Murray; Simmons *v.* 1059
Murray; Simpson *v.* 1102

	Page
Murray *v.* United States	1023
Murray; Wise *v.*	1044
Murtagh; Berks County *v.*	1017
Myers *v.* United States	1045,1149
Myrick *v.* United States	1036
Nader *v.* United States	1096
Nagle; Howard *v.*	1072
Naplin *v.* United States	1052
Napoles *v.* United States	1034
Naranjo *v.* United States	1095
Nard *v.* Reed	1056
Nashville Banner Publishing Co.; McKennon *v.*	1106
Nath, *In re*	1002,1104
National Bank of S. D., Presho; Gifford *v.*	1007
National Collegiate Athletic Assn.; Tarkanian *v.*	1033
Nationalist Movement *v.* Forsyth County	1033
NLRB; Cascade General, Inc. *v.*	1052
NLRB; Davis Supermarkets, Inc. *v.*	1003
NLRB; Forestwood Farms, Inc. *v.*	1108
NLRB *v.* Health Care & Retirement Corp. of America	571
NLRB; House of Raeford Farms, Inc. *v.*	1030
NLRB; NTA Graphics, Inc. *v.*	1124
NLRB; Tuskegee Area Transportation System *v.*	1083
NLRB; Visiting Homemaker & Health Services, Inc. *v.*	1123
National Railroad Passenger Corp.; Lebron *v.*	1105
National Transportation Safety Bd.; Woolsey *v.*	1081
National Union Fire Ins. Co.; Thomas *v.*	1013
NationsBank of N. C., N. A. *v.* Variable Annuity Life Ins. Co.	1141
Navanick *v.* United States	1042
Navarette-Avendano *v.* United States	1130
Navarro *v.* United States	1149
Nebraska; Kennedy *v.*	1038
Nebraska; Victor *v.*	1
Nebraska *v.* Wyoming	1066
Nebraska Dept. of Revenue *v.* Loewenstein	1104
Nebraska State Bar Assn.; Wheeler *v.*	1084
Nelson; Greco *v.*	1112
Nelson; Grieco *v.*	1112
Nelson *v.* Jones	1020,1138
Nelson *v.* Nelson	1107
Nelson *v.* United States	1131
Nethery *v.* Collins	1026
Nethery *v.* Texas	1123
Netters *v.* United States	1147

Page
Nevada; Ibarra-Arreola *v.* 1093
Nevada; Powell *v.* 79
Nevell *v.* United States 1036
Newblatt; Kalakay *v.* 1079
New Hampshire; Forster *v.* 1093
New Jersey; Busby *v.* 1035
New Jersey; Kamienski *v.* 1108
New Jersey *v.* New York 1080
New Jersey Dept. of Community Affairs; Miccio *v.* 1129
New Jersey Dept. of Env. Prot. & Energy; Torwico Electronics *v.* 1046
Newkirk *v.* Smith 1149
New Mexico; McDonald *v.* 1125
New Mexico Environment Dept. *v.* Franco 1005
Newport News Shipbuilding & Dry Dock Co.; Payne *v.* 1084
Newsome *v.* Floyd West & Co. 1079
New York; Alls *v.* 1090
New York; Almodovar *v.* 1131
New York; Contreras *v.* 1040
New York; Delaware *v.* 1028
New York; Godin *v.* 1131
New York; Hurley *v.* 1094
New York *v.* Martinez 1137
New York; New Jersey *v.* 1080
New York; Shabazz *v.* 1094
New York City; 383 Madison Associates *v.* 1081
New York City Police Dept.; Jackson *v.* 1004
New York Conf. of Blue Cross & B. Shield Plans *v.* Travelers Ins. 1067
New York Dept. of Correctional Services; Taveras *v.* 1132
New York State Dept. of Env. Conserv. *v.* Niagara Mohawk Power 1141
New York State Dept. of Tax. and Fin.; Bray Terminals, Inc. *v.* 1143
Neyens *v.* Iowa 1060
Nhan Kiem Tran *v.* United States 1048
Niagara Mohawk Power; New York State Dept. of Env. Conserv. *v.* 1141
Nichols *v.* United States 738
Nielsen *v.* United States 1023
Nimishillen & Tuscarawas R. Co.; Mickler *v.* 1084
Nink; Tucker *v.* 1111
Nolt, *In re* 1081
Norfolk Southern Corp.; Fuller *v.* 1015
Norfolk & Western R. Co.; Hughes *v.* 1128
Norris; Brown *v.* 1009
Norris; Holmes *v.* 1063
Norris; McCombs *v.* 1035
Norris *v.* Orndorff 1060

Page
Norris; Richley *v.* 1063
North American Vaccine, Inc. *v.* American Cyanamid Co. 1069
Northbrook Property & Casualty Ins. Co. *v.* Edwards 1103
North Carolina *v.* Bryant 1001
North Carolina; Horton *v.* 1088
North Carolina; McHone *v.* 1046
North Carolina; Rogers *v.* 1008,1102
North Carolina *v.* Williams 1001
Northeast Dept. ILGWU Health and Welfare Fund; Travitz *v.* 1143
Northington *v.* Hoffman 1038
Northrop Corp. *v.* United States *ex rel.* Barajas 1033
North Star Steel Co. *v.* Steelworkers 1048
NTA Graphics, Inc. *v.* National Labor Relations Bd. 1124
Nunez *v.* United States 1041
Nunnally *v.* Illinois 1008
Nunnelee; Yarrell *v.* 1056
Nyberg *v.* Singletary 1093
Oakes *v.* United States 1043
Oakland; Hazzard *v.* 1073
Oberg; Allied Van Lines, Inc. *v.* 1108
Oberg; Honda Motor Co. *v.* 1066
Ocean County Bd. of Social Services; Gonzalez *v.* 1078
O'Connor, *In re* 1048
O'Dea; Stephens *v.* 1037
Odeco Oil & Gas Co., Drilling Div. *v.* Bonnette 1004
Office of Personnel Management; Thieken *v.* 1037
Ogan *v.* Texas 1012
Ogunde *v.* United States 1149
Oh; Garey *v.* 1144
Ohio; Beuke *v.* 1100
Ohio; Buell *v.* 1100
Ohio; Byrd *v.* 1015
Ohio; Davis *v.* 1075
Ohio; Greer *v.* 1015,1078
Ohio; Henderson *v.* 1015
Ohio; Hicks *v.* 1015
Ohio; Hill *v.* 1087
Ohio; Horning *v.* 1047
Ohio; Jamison *v.* 1015
Ohio; Mason *v.* 1138
Ohio; Montgomery *v.* 1015,1078
Ohio; Paris *v.* 1046
Ohio; Poindexter *v.* 1015
Ohio; President *v.* 1071

	Page
Ohio; Scott *v.*	1015,1051
Ohio; Sowell *v.*	1015
Ohio Bell Communications, Inc.; Dickinson *v.*	1068
Ohio *ex rel.* Roszmann; Interstate Independent Corp. *v.*	1084
Ojeda Chang *v.* United States	1148
Oklahoma; Allen *v.*	1075
Oklahoma; Duffey *v.*	1040
Oklahoma *v.* Hain	1025
Oklahoma; Hain *v.*	1020
Oklahoma; Hooks *v.*	1100
Oklahoma *v.* Humphreys	1077
Oklahoma; Mann *v.*	1100
Oklahoma; Thornton *v.*	1075
Oklahoma; Williamson *v.*	1115
Okolie *v.* United States	1048
Okor *v.* United States	1146
Olivo *v.* United States	1077
Ollie *v.* Pennsylvania	1037
Omectin *v.* United States	1010
Omega Medical Center Associates; Martin *v.*	1011
Omoike *v.* Louisiana State Univ.	1138
O'Murchu *v.* Reno	1008
O'Murchu *v.* Suter	1042
O'Neal *v.* McAninch	1017,1067
O'Neil; D'Amario *v.*	1111
Oregon; Crockett *v.*	1075
Oregon Waste Systems, Inc. *v.* Department of Env. Quality of Ore.	93
Orion Pictures Corp. *v.* Showtime Networks, Inc.	1026
Orndorff; Norris *v.*	1060
Ortega *v.* California	1054
Ortiz *v.* United States	1058
Ortiz-Cameron *v.* United States	1003
Osborne; Mitchell *v.*	1112
Otero *v.* United States	1058
Ovalle *v.* United States	1043
Overland Express, Inc.; Interstate Commerce Comm'n *v.*	1103
Owens *v.* Texas	1141
Owens *v.* United States	1044
Owens-Corning Fiberglas Corp.; Amerada Hess Corp. *v.*	1051
Pace *v.* United States	1149
Pacific Enterprises; Hinton *v.*	1083
Pacific Mut. Life Ins. Co.; Morgan Stanley & Co. *v.*	658
Paddio *v.* Board of Trustees for State Colleges & Univs. of La.	1085
Page; Gacy *v.*	1079

	Page
Page *v.* United States	1115
Page-Bey *v.* United States	1060
Pagliara-Samayoa *v.* United States	1040
Paradise *v.* United States	1077
Paris *v.* Ohio	1046
Paris Accessories, Inc.; Solick *v.*	1063
Parish *v.* United States	1076
Parkridge Investors Ltd. Partnership *v.* Farmers Home Admin.	1142
Parlavecchio *v.* United States	1126
Parmet; Sei Young Choi *v.*	1145
Parole Panel; Esparza *v.*	1007
Parr; California *v.*	1005
Parris *v.* Cuthbert	1064
Parris *v.* United States	1077,1144
Parrish; McVay *v.*	1006
Passer; Hanson *v.*	1094
Patriarca *v.* United States	1069
Patterson *v.* United States	1146
Patton *v.* United States	1058
Paulk *v.* United States	1148
Pawlak *v.* Pennsylvania Bd. of Law Examiners	1101
Payne *v.* Escambia County Sheriff	1111
Payne *v.* Newport News Shipbuilding & Dry Dock Co.	1084
Peabody Institute, Johns Hopkins Univ. Conserv. of Music; Ray *v.*	1107
Peacock *v.* United States	1034
Pearson *v.* United States	1043,1126
Peck *v.* United States	1052
Pegg, *In re*	1139
Pennsylvania; Danilov *v.*	1038
Pennsylvania; Doctor *v.*	1132
Pennsylvania; Laessig *v.*	1089
Pennsylvania; Moran *v.*	1152
Pennsylvania; Ollie *v.*	1037
Pennsylvania; Sam *v.*	1115
Pennsylvania; Young *v.*	1012
Pennsylvania Bd. of Law Examiners; Pawlak *v.*	1101
Pennsylvania Dept. of Transportation; Warenczuk *v.*	1092
Pennsylvania Public Utility Comm'n; West Penn Power Co. *v.*	1105
Perry; Last Stand *v.*	1141
Perry; Protect Key West, Inc. *v.*	1141
Pete *v.* United States	1072
Peters; Brackett *v.*	1072
Peters; Dick *v.*	1056
Peterson *v.* Adventist Health System/Sunbelt, Inc.	1068

Page
Peterson *v.* Huguley Memorial Seventh-day Adventist Med. Ctr. 1068
Peterson *v.* Scully 1075
Peterson; Sellers *v.* 1040
Phelps *v.* Federal Government 1114
Phelps *v.* Lockheed Missiles & Space Co. 1012
Philadelphia; Fassnacht *v.* 1129
Philadelphia; Steinbronn *v.* 1145
Philip Morris Inc.; Tatum *v.* 1083
Philip Morris USA; Tatum *v.* 1083
Philippen; Morris County *v.* 1004
Phillips *v.* Ganjoo 1021
Phillips *v.* United States 1020
Phillips Petroleum Co. *v.* Robertson Oil Co. 1115
Phoebe Putney Memorial Hospital; Edwards *v.* 1039
Pickens *v.* Tucker 1079
Picray *v.* Des Moines 1085
Pieratt *v.* United States 1036
Pimentel; California *v.* 1125
Pine Bluff School Dist. No. 3; Williams *v.* 1007,1102
Pinkett *v.* United States 1041
Pirtle *v.* United States 1043
Pitts *v.* California 1009
Pitts *v.* United States 1040
Pizzulli; Laird *v.* 1091
Platsky *v.* Kilpatrick 1021
Plaut *v.* Spendthrift Farm, Inc. 1141
Poindexter *v.* Ohio 1015
Police *v.* Carpenter 1069
Pollard *v.* United States 1076
Polyak *v.* Boston 1053
Polyak *v.* Buford Evans & Sons 1053
Polyak *v.* Hamilton 1053
Polyak *v.* Hulen 1053
Polyak *v.* Stack 1053
Ponce *v.* United States 1045
Ponce de Leon *v.* California 1073
Poole *v.* Holland 1145
Poole *v.* Killeen 1101
Pope *v.* United States 1097
Port Authority Trans-Hudson Corp.; Hess *v.* 1067
Porter *v.* Michael Reese Hospital & Medical Center 1012
Porter *v.* United States 1058
Posters 'N' Things, Ltd. *v.* United States 513
Postmaster General; Simms *v.* 1026

Page
Postmaster General; Spranger *v.* 1108
Potillor *v.* Estelle 1131
Pough; Florida *v.* 1052
Powell *v.* Nevada 79
Powers *v.* United States 1034
President *v.* Ohio 1071
Presley, *In re* 1126
Pressley *v.* Medlock 1110
Preuss, *In re* 1081
Preuss *v.* District of Columbia 1008
Prewitt *v.* Molpus 1080
Price, *In re* 1103
Price *v.* Akaka 1070
Price *v.* Department of Navy 1144
Price *v.* Shalala 1073
Price; United States *v.* 1124
Prince *v.* Arkansas 1093
Protect Key West, Inc. *v.* Perry 1141
Provda, *In re* 1103
Provident Life & Accident Ins. Co.; Kee *v.* 1084
Prudential-LMI; Ayrs *v.* 1133
Prudhome *v.* United States 1097
Pryor; Simmons *v.* 1082
Pryor *v.* United States 1047
Psarianos *v.* United Kingdom Mut. S. S. Assurance Assn. 1142
Public Administrator of N. Y. County; United States Lines, Inc. *v.* 1085
Pucinski; LaBoy *v.* 1022
PUD No. 1 of Jefferson County *v.* Washington Dept. of Ecology 700
Puerto Rico Labor Rel. Bd.; Federacion de Maestros de P. R. *v.* 1069
Pugh *v.* California 1091
Puig-Mir *v.* United States 1082
Purificato *v.* Commissioner 1018
Purkett; Tyler *v.* 1008,1138
Putney Memorial Hospital; Edwards *v.* 1039
Quarles *v.* Scuderi 1034
Quinn-L Capital Corp. *v.* Royal Ins. Co. of America 1032
Qutb *v.* Bartlett 1127
Radford *v.* Chevron, U. S. A., Inc. 1012
Radziercz *v.* United States 1045
Raemisch; Harris *v.* 1089
Railroad Retirement Bd.; Mikhail *v.* 1110
Raji *v.* United States 1071
Raju *v.* Rhodes 1032
Ramaswami *v.* Texas Dept. of Human Services 1047

Page
Ramirez-Galvan *v.* United States 1094
Ramsden *v.* United States 1058
Ramsey *v.* Abbeville General Hospital 1032
Ramsey *v.* Crosby 1054
Ramsey *v.* Missouri 1078
Randall *v.* Florida 1040
Randall *v.* Singletary 1012,1048
Rangaire Corp.; Dempsey *v.* 1092
Rasheed-Bey *v.* DeBruyn 1019
Ratelle *v.* Crawford 1081
Rau *v.* United States 1113
Rawoot *v.* Signet Bank/Va. 1070
Ray *v.* California 1072
Ray *v.* Ervin 1110
Ray *v.* Peabody Institute, Johns Hopkins Univ. Conserv. of Music 1107
Ray *v.* United States 1010
Raymond *v.* Mobil Oil Corp. 1013
Raymond; Titlemore *v.* 1036
Razi-Bey *v.* Mann 1132
Reaves *v.* United States 1096
Recall '92, Inc. *v.* Edwards 1017
Redland Aggregates Ltd.; Snead *v.* 1050
Reed *v.* California 1006
Reed; Nard *v.* 1056
Reed *v.* United States 1060
Reese Hospital & Medical Center; Porter *v.* 1012
Refco, Inc. *v.* Committee of Receivers for A. W. Galadari 1069
Regents of Univ. of Cal.; Dunn *v.* 1090
Reich *v.* Collins 1067
Reich; Kim *v.* 1064
Reicher *v.* United States 1071
Reid *v.* Flint 1091
Reid *v.* United States 1077
Reimer & Koger Assoc.; Kansas Public Employees Ret. Sys. *v.* 1126
Reiskin *v.* Department of Water Supply/Maui County 1084
Reno; Jackson *v.* 1094
Reno; O'Murchu *v.* 1008
Rentschler, *In re* 1051
Resolution Trust Corp.; BFP *v.* 531
Resolution Trust Corp.; Davis *v.* 1006
Resolution Trust Corp.; Shane *v.* 1017
Reuter; Skipper *v.* 1017
Revello *v.* United States 1073
Revenue Comm'r of Ga.; Reich *v.* 1067

Page
Reyes *v.* Weimer 1023
Reynolds *v.* California 1111
Reynolds *v.* United States 1147
Rhinehart *v.* Seattle Times 1033
Rhodes; Raju *v.* 1032
Rice *v.* Vaughn 1089
Rich; Toegemann *v.* 1055
Richards *v.* Bartlett 1074,1112
Richards *v.* Scott 1092
Richardson; Lyle *v.* 1048
Richardson *v.* Shalala 1033,1048
Richardson *v.* United States 1006
Richley *v.* Norris 1063
Richmond *v.* United States 1134
Richmond *v.* Waters 1012
Richmond City Police Dept.; Lewis *v.* 1023
Rico-Ruiz *v.* United States 1058
Ritchie *v.* United States 1149
Rivas-Cordova *v.* United States 1096
Rivas-Gaytan *v.* United States 1130
Rivera *v.* California 1145
Rivera *v.* United States 1011,1035,1041
River Grove Police Pension Bd.; Ryndak *v.* 1052
Rivers; Moody *v.* 1088
Rivers *v.* Roadway Express, Inc. 298
Roadway Express, Inc.; Rivers *v.* 298
Roberson *v.* Maryland 1073
Roberts; Arney *v.* 1055
Roberts; Green *v.* 1090
Roberts; Sloan *v.* 1112
Robertson Oil Co.; Phillips Petroleum Co. *v.* 1115
Robins; Fromal *v.* 1133
Robinson *v.* Federal Deposit Ins. Corp. 1031
Robinson; Simpson *v.* 1048
Robinson *v.* Stock 1022
Robinson *v.* United States 1011
Robinson *v.* Welborn 1047
Rocha; Harris *v.* 1039
Rocha; Lashley *v.* 1090
Rock Island County; Boalbey *v.* 1076
Rodreiquez *v.* United States 1134
Rodrick *v.* United States 1043
Rogers *v.* California 1088
Rogers *v.* Commissioner 1019

Page
Rogers *v.* Inverness 1107
Rogers *v.* North Carolina 1008,1102
Rogers *v.* United States 1005
Roldan *v.* California 1091
Roman *v.* United States 1129
Roman Catholic Bishop of Worcester; Fortin *v.* 1142
Romero *v.* California 1085
Romero *v.* United States 1025
Rone; Carter *v.* 1045
Rong Hua Chen *v.* United States 1039
Rosa *v.* United States 1042
Rosch *v.* United States 1057
Rose *v.* Merrell Dow Pharmaceuticals 1040,1153
Rose *v.* United States 1085
Rose *v.* Westmoreland Coal Co. 1083
Ross *v.* California 1088
Ross *v.* United States 1042,1124
Ross *v.* ZVI Trading Corp. Employees' Pension Plan & Trust 1017
Ross; ZVI Trading Corp. Employees' Pension Plan & Trust *v.* 1017
Rosser *v.* United States 1091
Roszmann; Interstate Independent Corp. *v.* 1084
Rougeau *v.* Collins 1078
Rowland; Miller *v.* 1008
Rowland; Trujillo-Garcia *v.* 1132
Royal *v.* United States 1102
Royal Ins. Co. of America; Quinn-L Capital Corp. *v.* 1032
Rubens *v.* Shine, Julianelle, Karp, Bozelko & Karazin, P. C. 1142
Rubinstein *v.* Department of Navy 1024
Ruchti *v.* Hedley 1088
Rufolo; Midwest Marine Contractor, Inc. *v.* 1050
Ruiz *v.* United States 1144
Runyon; Simms *v.* 1026
Runyon; Spranger *v.* 1108
Ruscitti *v.* Farmers Ins. Exchange 1107
Russell *v.* Shaker Heights Municipal Court 1131
Ruzicka *v.* United States 1072
Ryan; Luckette *v.* 1076
Ryles *v.* United States 1076
Ryndak *v.* River Grove Police Pension Bd. 1052
Ryskamp *v.* United States 1148
S. *v.* District of Columbia 1072
Sacks, *In re* 1001
Saenz Salaiz *v.* United States 1094
Saenz Soliz *v.* United States 1094

	Page
St. Paul Property & Casualty; Vitek *v.*	1048
Sakaria *v.* Trans World Airlines	1083
Salaiz *v.* United States	1094
Salazar *v.* United States	1057
Salcedo *v.* United States	1114
Salomon Forex, Inc.; Tauber *v.*	1031,1138
Salter *v.* Whitley	1145
Sam *v.* Pennsylvania	1115
Sammett Corp. *v.* Key Enterprises of Del., Inc.	1126
Sammi Corp.; Vollrath Co. *v.*	1142
Sammons, *In re*	1102
Samrick *v.* United States	1006
Samuels *v.* United States	1144
Samura *v.* Kaiser Foundation Health Plan, Inc.	1084
Sanchez *v.* Martinez	1021
Sanchez *v.* United States	1011,1023,1095
Sanchez Santana *v.* United States	1114
Sanchez Tellez *v.* United States	1060
Sanders, *In re*	1029
Sanders *v.* Kansas City	1052
Sanders; Wilson *v.*	1111
Sanderson *v.* Winfield Carraway Hospital	1031
Sandoval *v.* California	1,1101
Sanford *v.* Alameda-Contra Costa Transit Dist.	1007,1102
Santa Monica; Human *v.*	1090
Santana *v.* United States	1114
Santiago *v.* United States	1060
Santiago-Godinez *v.* United States	1060
Savich *v.* Savich	1055
Schackart *v.* Arizona	1046
Schlup *v.* Delo	1003
Schneider *v.* United States	1106
Schwartz, *In re*	1066
Scott, *In re*	1027
Scott *v.* Delo	1091
Scott; Gonzales *v.*	1146
Scott; Holmes *v.*	1092
Scott; Johnson *v.*	1146
Scott; Kennedy *v.*	1118
Scott; Martin *v.*	1133
Scott; Munir *v.*	1134
Scott *v.* Ohio	1015,1051
Scott; Richards *v.*	1092
Scroggy, *In re*	1051

Page
Scuderi; Quarles *v.* 1034
Scully; Peterson *v.* 1075
Seagrave *v.* Lake County 1092
Sears, Roebuck & Co. *v.* Harris 1128
Seattle *v.* Bascomb 1127
Seattle Times; Rhinehart *v.* 1033
Second Judicial District Court of Nev.; Allum *v.* 1109
Secretary, N. C. Dept. of Crime Control; Barfield *v.* 1109
Secretary of Army; Beard *v.* 1018
Secretary of Army; Sikka *v.* 1078
Secretary of Defense; Last Stand *v.* 1141
Secretary of Defense; Protect Key West, Inc. *v.* 1141
Secretary of HHS; Baker *v.* 1035,1153
Secretary of HHS; Balog *v.* 1110
Secretary of HHS; Falin *v.* 1036
Secretary of HHS *v.* Guernsey Memorial Hospital 1016
Secretary of HHS; Hando *v.* 1074
Secretary of HHS; Huey *v.* 1068
Secretary of HHS; LeBlanc *v.* 1113
Secretary of HHS; McCummings *v.* 1032
Secretary of HHS; Methodist Hospital *v.* 1142
Secretary of HHS; Price *v.* 1073
Secretary of HHS; Richardson *v.* 1033,1048
Secretary of HHS; Semien *v.* 1118
Secretary of HHS; Tschida *v.* 1023
Secretary of Labor; Kim *v.* 1064
Secretary of Navy *v.* Specter 462
Secretary of State of Miss.; Prewitt *v.* 1080
Secretary of Veterans Affairs *v.* Gardner 1017
Secretary of Veterans Affairs; Jeffress *v.* 1112
Secretary of Veterans Affairs; McNaron *v.* 1108
Security Services, Inc. *v.* Garvey Corp. 1106
Security Services, Inc. *v.* John H. Harland Co. 1106
Security Services, Inc. *v.* Kmart Corp. 431
Sei Young Choi *v.* Parmet 1145
Sellers *v.* Peterson 1040
Sellick Equipment, Inc. *v.* Boutte 1018
Semien *v.* Shalala 1118
Senich *v.* Lambdin 1145
Senkowski; Johnson *v.* 1037
Serhan *v.* United States 1041
Serna Sanchez *v.* United States 1095
Setlech *v.* United States 1085
Shabazz *v.* New York 1094

Page
Shackford *v.* Murray 1056
Shaker Heights Municipal Court; Russell *v.* 1131
Shakespeare, Inc.; Silstar Corp. of America, Inc. *v.* 1127
Shakur *v.* Beyer 1039
Shalala; Baker *v.* 1035,1153
Shalala; Balog *v.* 1110
Shalala; Falin *v.* 1036
Shalala *v.* Guernsey Memorial Hospital 1016
Shalala; Hando *v.* 1074
Shalala; Huey *v.* 1068
Shalala; LeBlanc *v.* 1113
Shalala; McCummings *v.* 1032
Shalala; Methodist Hospital *v.* 1142
Shalala; Price *v.* 1073
Shalala; Richardson *v.* 1033,1048
Shalala; Semien *v.* 1118
Shalala; Tschida *v.* 1023
Shane *v.* Resolution Trust Corp. 1017
Shanteau *v.* Department of Social Services 1008,1102
Shanz *v.* Groose 1074
Sharp's Pawn Shop *v.* Board of County Comm'rs of Osage County 1031
Shelley; Kellom *v.* 1020
Shelling *v.* Southern R. Co. 1047
Shelton *v.* Eberhardt 1007
Shelton *v.* Estelle 1055
Shelton *v.* United States 1143
Sherman *v.* Community Consol. School Dist. 21 of Wheeling Twp. 1110
Shieh, *In re* 1052
Shimizu *v.* Bellah 1032
Shimizu *v.* Superior Court of Cal., Sonoma County 1032
Shine, Julianelle, Karp, Bozelko & Karazin, P. C.; Rubens *v.* 1142
Shockey *v.* Badger Coal Co. 1035,1153
Shoop *v.* Dauphin County 1088
Shorthouse *v.* United States 1085
Showtime Networks, Inc.; Orion Pictures Corp. *v.* 1026
Siegel *v.* James Island Public Service Dist. 1053,1152
Signet Bank/Va.; Rawoot *v.* 1070
Sikka *v.* West 1078
Silstar Corp. of America, Inc. *v.* Shakespeare, Inc. 1127
Silva *v.* California 1092
Silvey Refrigerated Carriers, Inc. *v.* H. J. Heinz Co. 1106
Simmons *v.* Collins 1073
Simmons *v.* Murray 1059
Simmons *v.* Pryor 1082

Page
Simms *v.* Runyon 1026
Simon *v.* California 1072
Simpson *v.* Murray 1102
Simpson *v.* Robinson 1048
Simpson; United States *v.* 1125
Simpson Paper (Vt.) Co. *v.* Department of Env. Conservation 1141
Sims *v.* United States 1034
Sims-Robertson *v.* United States 1095
Singletary; Marek *v.* 1100
Singletary; Nyberg *v.* 1093
Singletary; Randall *v.* 1012,1048
Singletary; Stewart *v.* 1049
Singletary; Whiting *v.* 1087
Singletary; Williams *v.* 1111
Singletary; Woods *v.* 1092
Singleton *v.* Carmichael 1144
Sinkfield *v.* United States 1044
Sipos *v.* Williamson 1101
Skarbnik; Blackston *v.* 1102
Skipper *v.* Reuter 1017
Slade *v.* United States 1024
Slesarik *v.* Luna County 1072
Sloan, *In re* 1139
Sloan *v.* Guillory 1132
Sloan *v.* Roberts 1112
Sloan *v.* United States 1034
Slotky; Chicago Truck Drivers Pension Fund *v.* 1018
Smith, *In re* 1103
Smith *v.* Borg 1088
Smith; Christiansen *v.* 1034
Smith; Clinton *v.* 1091
Smith; Deane *v.* 1093
Smith; Hood *v.* 1009
Smith *v.* Indiana 1063
Smith *v.* Lucas 1026
Smith; Mazyck *v.* 1037
Smith; Newkirk *v.* 1149
Smith *v.* United States 1129,1130,1134
Snavely *v.* United States 1087
Snead *v.* Redland Aggregates Ltd. 1050
Snell *v.* Denver 1138
Snelling *v.* Chrysler Motors Corp. 1079
Snider *v.* California 1090
Snitkin *v.* United States 1097

Page
Snyder; Henson *v.* 1040
Snyder; Jones *v.* 1009
Snyder *v.* Love 1007
Snyder; McMurtry *v.* 1037
Sobol; Medical Society of N. Y. *v.* 1152
Solick *v.* Paris Accessories, Inc. 1063
Soliz *v.* United States 1094
Sotelo Sanchez *v.* United States 1023
South Carolina; Buchanan *v.* 1074,1153
South Carolina; Elkins *v.* 1063
South Carolina; Matthews *v.* 1138
South Dakota; Stetter *v.* 1146
Southern R. Co.; Shelling *v.* 1047
Southern R. Co.; Wilson *v.* 1101
Sova; Zack *v.* 1071
Sowders *v.* Carter 1097
Sowell *v.* Ohio 1015
Spain *v.* Aetna Life Ins. Co. 1052
Spaletta *v.* California Workers' Compensation Appeals Bd. 1006
Spaulding; Woolery *v.* 1057
Specter; Dalton *v.* 462
Spence, *In re* 1015,1125
Spencer *v.* California 1144
Spencer *v.* Wright 1065
Spendthrift Farm, Inc.; Plaut *v.* 1141
Sperling; DiPinto *v.* 1082
Spotswood Construction Loans, L. P.; Lux *v.* 1011
Spranger *v.* Runyon 1108
Spychala *v.* Gomez 1089
Stack; Polyak *v.* 1053
Stanley *v.* United States 1044
Stanley & Co. *v.* Pacific Mut. Life Ins. Co. 658
Stansbury *v.* California 318
Stanton; Boothe *v.* 1009,1153
Staples *v.* United States 600
Starkes *v.* United States 1124
Starkey *v.* Henderson 1110
State. See also name of State.
State Bar of Mont.; Steele *v.* 1128
State Bar of Wis.; Crosetto *v.* 1129
State Farm Ins. Co.; Bynum *v.* 1009
State Farm Lloyds Co.; Adamo *v.* 1053
State Farm Mut. Automobile Ins. Co.; Gallodoro *v.* 1070
Staton *v.* Vaughn 1021

	Page
Stauffacher *v.* Teledyne Continental Motors	1053
Steel *v.* Wachtler	1023,1118
Steele *v.* State Bar of Mont.	1128
Steele *v.* United States	1040
Steelworkers; North Star Steel Co. *v.*	1048
Steelworkers *v.* Warrior & Gulf Navigation Co.	1083
Steinbronn *v.* Philadelphia	1145
Steiner; Brunwasser *v.*	1067
Steinhorn, *In re*	1103
Stepanik; Benson *v.*	1075
Stepanik; Hollawell *v.*	1132
Stepanik; Ledden *v.*	1039
Stepanik; Lomax *v.*	1075
Stephens *v.* O'Dea	1037
Stephenson *v.* United States	1095
Stetter *v.* South Dakota	1146
Stevens, *In re*	1103
Stevens; Conyers Community Church, Inc. *v.*	1053
Stewart *v.* Chiles	1048
Stewart *v.* Florida	1049,1050
Stewart *v.* Singletary	1049
Stewart *v.* United States	1094
Stewart; Williams *v.*	1109
Stillwell *v.* Idaho	1056
Stinson; Johnson *v.*	1037
Stock; Robinson *v.*	1022
Stockdale *v.* United States	1023
Stoddard *v.* California	1086
Stone *v.* Immigration and Naturalization Service	1105
Strahan; Thandiwe *v.*	1132
Strange; Duncan *v.*	1034
Streeter *v.* Alabama	1110
Streeter *v.* Burton	1054,1132
Stribling *v.* Collins	1101
Strickland; Taylor *v.*	1039,1138
Strobridge *v.* United States	1053
Stroud *v.* United States	1023
Suda *v.* Brenner	1022
Suggs *v.* United States	1142
Sullivan *v.* Clark	1039
Sullivan *v.* Flannigan	1007
Sundance Cruises Corp. *v.* American Bureau of Shipping	1018
Sunrise Bank of Cal.; Anolik *v.*	1047

Page

Superintendent of penal or correctional institution. See name or title of superintendent.

Superior Court of Cal., Appellate Dept., L. A. County; Andrisani *v.* 1064

Superior Court of Cal., L. A. County; Baxter *v.* 1056

Superior Court of Cal., Sonoma County; Shimizu *v.* 1032

Suter; O'Murchu *v.* 1042

Sweatt *v.* United States 1045

Sweeney *v.* Civil Service Comm'n 1007,1102

Swerdlow, *In re* 1139

Swisher; Alston *v.* 1057

Symington; Gainer *v.* 1073

Tanner *v.* United States 1082

Tansy; Murrillo *v.* 1056

Tantalo *v.* United States 1041

Taren-Palma *v.* United States 1071

Tarkanian *v.* National Collegiate Athletic Assn. 1033

Tarver *v.* Alabama 1078

Tarver *v.* United States 1060

Tatum *v.* Philip Morris Inc. 1083

Tatum *v.* Philip Morris USA 1083

Tauber *v.* Salomon Forex, Inc. 1031,1138

Tavaglione; Billings *v.* 1142

Tavarez *v.* United States 1071

Taveras *v.* New York Dept. of Correctional Services 1132

Taylor; Gaster *v.* 1008

Taylor *v.* Johnson 1044,1153

Taylor *v.* Strickland 1039,1138

Taylor *v.* United States 1097

Taylor; Wallace *v.* 1038

T. B.; J. E. B. *v.* 127

TCBY Systems, Inc.; EGB Associates, Inc. *v.* 1108

Teledyne Continental Motors; Stauffacher *v.* 1053

Tellez *v.* United States 1060

Tenantry; Diocese of Colo. *v.* 1137

Tenner *v.* California 1056

Tennessee; Van Tran *v.* 1046

Terio *v.* Terio 1022

Ternes *v.* Berchard 1127

Terrell *v.* California 1007

Territory. See name of Territory.

Terry *v.* United States 1042

Texas; Alexander *v.* 1100

Texas; Barnes *v.* 1063

Texas; Behringer *v.* 1012

Page
Texas; Chambers *v.* 1100
Texas; Gosch *v.* 1046
Texas; Hughes *v.* 1152
Texas; Johnson *v.* 1046
Texas; King *v.* 1133
Texas; Lamberty *v.* 1014
Texas; Madison *v.* 1063
Texas; Moreno *v.* 1012
Texas; Nethery *v.* 1123
Texas; Ogan *v.* 1012
Texas; Owens *v.* 1141
Texas; Tucker *v.* 1012
Texas; Walker *v.* 1076
Texas; Watson *v.* 1076
Texas; Wills *v.* 1097
Texas Commerce Bancshares, Inc. *v.* Grossman 1128
Texas Dept. of Human Services; Ramaswami *v.* 1047
Thakkar *v.* Debevoise 1013
Thandiwe *v.* Compton 1132
Thandiwe *v.* Strahan 1132
Thieken *v.* Office of Personnel Management 1037
Third National Bank in Nashville *v.* Commissioner of Ins. of La. 1082
T–H New Orleans Ltd. Partnership *v.* Financial Security Assurance, Inc. 1083
Thomas *v.* National Union Fire Ins. Co. 1013
Thomas *v.* United States 1004,1043,1148
Thompson *v.* California 1038
Thompson; Collins *v.* 1127
Thompson; Kowalczyk *v.* 1109
Thompson *v.* United States 1010,1038,1112,1138
Thornton *v.* Oklahoma 1075
383 Madison Associates *v.* New York City 1081
Thurman; Galloway *v.* 1091
Ticor Title Ins. Co. *v.* Brown 117
Tiemeyer *v.* Community Mut. Ins. Co. 1005
Tigard; Dolan *v.* 1016
Tilmon *v.* United States 1094
Tingstrom; Missouri Pacific R. Co. *v.* 1026,1083
Tingstrom; Union Pacific R. Co. *v.* 1026,1083
Titlemore *v.* Raymond 1036
Tizeno *v.* California 1089
Todd Shipyards Corp. *v.* Edwards 1031
Toegemann *v.* Rich 1055
Tonka Corp. *v.* Bituminous Casualty Corp. 1083

	Page
Tooze *v.* California	1074
Topanga Press, Inc.; Los Angeles *v.*	1030
Tornowski *v.* Hart	1045
Torres Rivera *v.* United States	1035
Torwico Electronics, Inc. *v.* N. J. Dept. of Env. Prot. & Energy	1046
Town. See name of town.	
Townley *v.* Jones	1131
Towns *v.* Illinois	1115
Toy *v.* Florida	1111
Tran *v.* Tennessee	1046
Tran *v.* United States	1024,1048
Transamerican Natural Gas Corp. *v.* Zapata Partnership, Ltd.	1143
Transcon Lines; Interstate Commerce Comm'n *v.*	1029,1105
Trans World Airlines; Sakaria *v.*	1083
Trans World Airlines, Inc.; Hillary *v.*	1128
Traunig *v.* Department of Veterans Affairs	1044
Travelers Ins. Co.; Cuomo *v.*	1067
Travelers Ins. Co.; Hospital Assn. of N. Y. *v.*	1067
Travelers Ins. Co.; N. Y. Conf. of Blue Cross & B. Shield Plans *v.*	1067
Travitz *v.* Northeast Dept. ILGWU Health and Welfare Fund	1143
Treadwell *v.* United States	1058
Treasury Employees; United States *v.*	1029,1102
Tregenza *v.* Great American Communications Co.	1085
Tregoning *v.* American Community Mut. Ins. Co.	1082
Tremblay; DiCicco *v.*	1026
Trevizo-Ortiz *v.* United States	1130
Tripati *v.* Arizona	1072
Triplin *v.* United States	1148
Trippet *v.* California	1073
Tri-State Rubbish, Inc. *v.* Auburn	1106
Tri-State Rubbish, Inc.; Gray *v.*	1106
Trong *v.* California	1144
Trujillo-Garcia *v.* Rowland	1132
TRW, Inc.; Eagleye *v.*	1004
Tschida *v.* Shalala	1023
Tucker; Askew *v.*	1023
Tucker *v.* Georgia Dept. of Human Resources *ex rel.* Cassel	1141
Tucker *v.* Nink	1111
Tucker; Pickens *v.*	1079
Tucker *v.* Texas	1012
Tucker *v.* United States	1034,1095
Tullahoma City Schools Bd. of Ed.; Doe *v.*	1108
Turnbull *v.* United States	1059
Turner *v.* United States	1045

Page
Turner; Zink *v.* 1057
Tuskegee Area Transportation System *v.* NLRB 1083
Two Unknown Marshals; Brown *v.* 1020
Tyler *v.* Purkett 1008,1138
Uberoi *v.* University of Colo. 1129
Uberoi *v.* University of Colo. Bd. of Regents 1031
Ulyas *v.* Costa 1032
Uncle Ben's, Inc.; Johnson *v.* 1068
Union. For labor union, see name of trade.
Union Carbide Corp.; Lamb *v.* 1107
Union Pacific R. Co. *v.* Tingstrom 1026,1083
United. For labor union, see name of trade.
United Foods, Inc.; Gutierrez *v.* 1142
United Kingdom Mut. S. S. Assur. Assn. (Bermuda); Psarianos *v.* 1142
United Parcel Service; Austin *v.* 1152
United States. See name of other party.
U. S. Bancorp Mortgage Co. *v.* Bonner Mall Partnership 1002,1140
U. S. Bankruptcy Court, Southern Dist. of N. Y.; Landesberg *v.* 1034
U. S. District Court; Bryant *v.* 1110
U. S. District Court; California *v.* 1005
U. S. District Court; Erwin *v.* 1025,1153
U. S. District Court; Geery *v.* 1109
U. S. District Court; Israel *v.* 1110
U. S. District Judge; Kalakay *v.* 1079
U. S. District Judge; Thakkar *v.* 1013
United States Lines, Inc. *v.* Public Administrator of N. Y. County 1085
U. S. Railroad Retirement Bd.; Hammons *v.* 1069
University of Colo. *v.* Derdeyn 1070
University of Colo.; Uberoi *v.* 1129
University of Colo. Bd. of Regents; Uberoi *v.* 1031
Urias-Melendez *v.* United States 1044
USI Film Products; Landgraf *v.* 244
Utah; Hagen *v.* 1047
Vailuu *v.* California 1022
Valdes-Puig *v.* United States 1147
Valencia *v.* United States 1147
Valenzuela-Lopez *v.* United States 1130
Valera *v.* United States 1071
Vance; Bartlett *v.* 1040,1102
Van der Veur; Estes *v.* 1021,1102
Vandrew; Webber *v.* 1131
VanDyke *v.* Douglas VanDyke Coal Co. 1078
VanDyke Coal Co.; VanDyke *v.* 1078
Van Engel *v.* United States 1142

Page
Van Haele *v.* Montana 1144
Vanover *v.* Lampkin 1019
Van Sickle *v.* McGinnis 1042
Van Tran *v.* Tennessee 1046
Van Wagner *v.* United States 1054
Van Winkle *v.* Kansas 1144
Variable Annuity Life Ins. Co.; Ludwig *v.* 1141
Variable Annuity Life Ins. Co.; NationsBank of N. C., N. A. *v.* 1141
Vaughan *v.* First National Bank of Shamrock 1127
Vaughan *v.* United States 1094
Vaughn; Carter *v.* 1040
Vaughn; Clifton *v.* 1040
Vaughn; Grant *v.* 1041
Vaughn; Rice *v.* 1089
Vaughn; Staton *v.* 1021
Vaughn *v.* United States 1036
Vela *v.* United States 1149
Veltman *v.* United States 1044
Venable, *In re* 1015
Ventetoulo *v.* DeWitt 1032
Vermont Dept. of Public Service; Choudhary *v.* 1133
Vernon; Loomis *v.* 1143
Via; Hale *v.* 1054
Vickery *v.* United States 1020
Victor *v.* Nebraska 1
Vidmark, Inc.; Gill *v.* 1085
Vierrether *v.* United States 1030
Villa *v.* United States 1044
Villanueva *v.* United States 1146
Villegas Lopez *v.* Arizona 1046
Vincent *v.* United States 1041
Virginia; Catlett *v.* 1005
Virginia; Dubois *v.* 1012
Virginia Retirement System; Kahn *v.* 1083
Virginia State Bar Disciplinary Bd.; Fromal *v.* 1090
Virgin Islands; Martinez Diaz *v.* 1114
Visintine *v.* United States 1010
Visiting Homemaker & Health Services, Inc. *v.* NLRB 1123
Vitek *v.* St. Paul Property & Casualty 1048
Vogt *v.* United States 1071
Voight *v.* Lewis 1112
Voinovich, *In re* 1126
Vollrath Co. *v.* Sammi Corp. 1142
Von Schiget *v.* California 1039

Page
Wachtler; Steel *v.* 1023,1118
Wade, *In re* 1015,1125
Walden *v.* United States 1024
Walker, *In re* 1068
Walker *v.* Jones 1111
Walker *v.* Texas 1076
Walker *v.* United States 1096
Wall *v.* United States 1024
Wallace *v.* Taylor 1038
Wallace *v.* United States 1095
Walsh *v.* United States 1081
Warden. See name of warden.
Warenczuk *v.* Pennsylvania Dept. of Transportation 1092
Warner *v.* United States 1147
Warren *v.* California 1021
Warren *v.* Grand Rapids 1101
Warren *v.* United States 1034,1047,1110
Warrior & Gulf Navigation Co.; Steelworkers *v.* 1083
Washington, *In re* 1029
Washington *v.* California 1056
Washington *v.* United States 1020
Washington Dept. of Ecology; PUD No. 1 of Jefferson County *v.* 700
Waters *v.* Churchill 661
Waters; Richmond *v.* 1012
Waters *v.* United States 1053
Watkins; Alabama *v.* 1137
Watson *v.* Morris 1021,1118
Watson *v.* Texas 1076
Watson *v.* United States 1010,1076
Watt *v.* United States 1129
Waugh *v.* Georgia 1090
Weaver *v.* California 1127
Weaver; Employers Underwriters, Inc. *v.* 1129
Weaver Popcorn Co.; Golden Valley Microwave Foods, Inc. *v.* 1128
Webb *v.* Collins 1013
Webber *v.* Vandrew 1131
Weber *v.* Gorenfeld 1038
Weber *v.* Murphy 1097
Webster County Sheriff's Dept., Marshfield; Hoffman *v.* 1092
Weeks; Iverson *v.* 1030
Wehringer *v.* Brannigan 1048
Weidner; Armesto *v.* 1090
Weimer; Reyes *v.* 1023
Welborn; Robinson *v.* 1047

Page
Welch *v.* United States 1096
Wells, *In re* 1028
Wells *v.* American Airlines 1080
Wells; Conn *v.* 1135
Wells *v.* United States 1050
West *v.* Arizona 1063
West; Beard *v.* 1018
West; Sikka *v.* 1078
West *v.* United States 1081,1147
Westchester County *v.* Commissioner of Transportation of Conn. 1107
Westchester County; Murphy *v.* 1110
West & Co.; Newsome *v.* 1079
Western-Southern Life Ins. Co.; Gross *v.* 1037
Westfall *v.* Whitley 1092
Westmoreland Coal Co.; Rose *v.* 1083
West Penn Power Co. *v.* Pennsylvania Public Utility Comm'n 1105
Wetzler; Henry *v.* 1126
Weyerhaeuser Co.; Woodworkers *v.* 1128
Whatcom County; Lummi Indian Tribe *v.* 1066
Wheeler *v.* Nebraska State Bar Assn. 1084
Whitaker, *In re* 1105
White *v.* Browning-Ferris, Inc. 1142
White; Hernandez *v.* 1073
White; Hughes *v.* 1039
White; Hunter *v.* 1091
White *v.* Immigration and Naturalization Service 1141
White *v.* United States 1037,1043,1047,1072
Whitehead *v.* Bradley Univ. 1055
Whitehead *v.* United States 1059
White Mountain Apache Tribe of Ariz. *v.* United States 1030
Whiting *v.* Singletary 1087
Whitley; Joseph *v.* 1039
Whitley; Kyles *v.* 1051,1125
Whitley; Salter *v.* 1145
Whitley; Westfall *v.* 1092
Whitley; Wright *v.* 1144
Whitman *v.* Donoghue 1108
Whitmore *v.* Gaines 1079
Wiedeman; Louisiana Dept. of Transportation and Development *v.* 1127
Williams *v.* Alabama 1012
Williams *v.* California 1022,1055
Williams; Goad *v.* 1053
Williams *v.* Hawley 1055,1131
Williams; North Carolina *v.* 1001

Page
Williams *v.* Pine Bluff School Dist. No. 3 1007,1102
Williams *v.* Singletary 1111
Williams *v.* Stewart 1109
Williams *v.* United States 1035,1044,1057
Williamson *v.* Oklahoma 1115
Williamson; Sipos *v.* 1101
Willis *v.* DeBruyn 1005
Willoughby of Chevy Chase Condo. Council of Owners; Istvan *v.* 1037
Wills *v.* Texas 1097
Wilson *v.* Chicago 1088
Wilson; Constant *v.* 1033
Wilson; Edwards *v.* 1006
Wilson *v.* Lanham 1074
Wilson *v.* Sanders 1111
Wilson *v.* Southern R. Co. 1101
Wilson *v.* United States 1054,1057,1130,1134
Wilt; Buracker *v.* 1129
Winfield Carraway Hospital; Sanderson *v.* 1031
Winkler *v.* Keane 1022
Winston *v.* Maine Terminal College System 1069
Winterboer; Asgrow Seed Co. *v.* 1029
Winters *v.* Board of County Comm'rs of Osage County 1031
Winters; Landsdown *v.* 1031
Wisconsin; Beson *v.* 1072
Wise *v.* Murray 1044
Wiseman *v.* United States 1032
Wisneski; Jackson *v.* 1012
Witcher *v.* Witcher 1055
Witt *v.* California 1132
Wolens; American Airlines, Inc. *v.* 1017
Wolfe *v.* California 1145
Wolfe *v.* Meyers 1057
Women's Health Center, Inc.; Madsen *v.* 1016
Wood; Campbell *v.* 1118,1119
Wood *v.* Larson 1089
Woodard, *In re* 1051
Woodruff *v.* California 1087
Woods; Esparza *v.* 1007
Woods *v.* Singletary 1092
Woodward *v.* United States 1041
Woodworkers *v.* Weyerhaeuser Co. 1128
Woolery *v.* Spaulding 1057
Woolsey *v.* National Transportation Safety Bd. 1081
Workers' Compensation Appeals Bd. of Cal.; Yitref *v.* 1036

Page

Wormuth *v.* California 1075
Wright *v.* California 1087
Wright; Convertino *v.* 1018
Wright; Dowell *v.* 1077
Wright *v.* Marshall 1022,1102
Wright; Spencer *v.* 1065
Wright *v.* Whitley 1144
Wright *v.* Wright 1087
Wu *v.* Board of Trustees, Univ. of Ala. 1033
Wuliger *v.* United States 1101
Wyoming; Nebraska *v.* 1066
Wyoming Dept. of Corrections; Meis *v.* 1072
Yamada, *In re* 1140
Yarrell *v.* Nunnelee 1056
Yater *v.* Hancock County Planning Comm'n 1019
Yeager *v.* United States 1093
Yeamons *v.* California 1075
Yin Chu *v.* United States 1035
Yitref *v.* Workers' Compensation Appeals Bd. of Cal. 1036
York Rite Bodies of Freemasonry of Savannah *v.* Board of Equalization of Chatham County 1070
Young *v.* California 1090
Young *v.* Pennsylvania 1012
Young Choi *v.* Parmet 1145
Younger *v.* Younger 1005
Young In Hong *v.* Children's Memorial Hospital 1005
Zack *v.* Sova 1071
Zack *v.* United States 1134
Zant; Conklin *v.* 1100
Zant; Hance *v.* 1013
Zant; Jefferson *v.* 1046
Zapata *v.* United States 1045
Zapata Gulf Marine Corp. *v.* Chiasson 1029
Zapata Partnership, Ltd.; Transamerican Natural Gas Corp. *v.* 1143
Ziegler *v.* Board of Bar Examiners of Del. 1084
Zink *v.* Turner 1057
Zotos *v.* United States 1075
Zuniga-Rosales *v.* United States 1094
ZVI Trading Corp. Employees' Pension Plan & Trust *v.* Ross 1017
ZVI Trading Corp. Employees' Pension Plan & Trust; Ross *v.* 1017
Zzie, *In re* 1068

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1993

VICTOR *v.* NEBRASKA

CERTIORARI TO THE SUPREME COURT OF NEBRASKA

No. 92–8894. Argued January 18, 1994—Decided March 22, 1994*

The government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship,* 397 U. S. 358. In upholding the first degree murder convictions and death sentences of petitioners Sandoval and Victor, the Supreme Courts of California and Nebraska, respectively, rejected contentions that due process was violated by the pattern jury instructions defining "reasonable doubt" that were given in both cases.

Held: Taken as a whole, the instructions in question correctly conveyed the concept of reasonable doubt, and there is no reasonable likelihood that the jurors understood the instructions to allow convictions based on proof insufficient to meet the *Winship* standard. Pp. 5–23.

(a) The Constitution does not dictate that any particular form of words be used in advising the jury of the government's burden of proof, so long as "taken as a whole, the instructions correctly conve[y] the concept of reasonable doubt," *Holland* v. *United States,* 348 U. S. 121, 140. In invalidating a charge declaring, among other things, that a reasonable doubt "must be such . . . as would give rise to a grave uncertainty," "is an actual substantial doubt," and requires "a moral certainty," the Court, in *Cage* v. *Louisiana,* 498 U. S. 39, 40, observed that

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*Together with No. 92–9049, *Sandoval* v. *California,* on certiorari to the Supreme Court of California.

a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that which is constitutionally required. However, in *Estelle* v. *McGuire*, 502 U. S. 62, 72, and n. 4, the Court made clear that the proper inquiry is not whether the instruction "could have" been applied unconstitutionally, but whether there is a reasonable likelihood that the jury *did* so apply it. Pp. 5–6.

(b) The instructions given in Sandoval's case defined reasonable doubt as, among other things, "not a mere possible doubt," but one "depending on moral evidence," such that the jurors could not say they felt an abiding conviction, "to a moral certainty," of the truth of the charge. Pp. 6–9.

(c) Sandoval's objection to the charge's use of the 19th century phrases "moral evidence" and "moral certainty" is rejected. Although the former phrase is not a mainstay of the modern lexicon, its meaning today is consistent with its original meaning: evidence based on the general observation of people, rather than on what is demonstrable. Its use here is unproblematic because the instructions given correctly pointed the jurors' attention to the facts of the case before them, not (as Sandoval contends) the ethics or morality of his criminal acts. For example, in the instruction declaring that "everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt," moral evidence can only mean empirical evidence offered to prove matters relating to human affairs—the proof introduced at trial. Similarly, whereas "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt," its use in conjunction with the abiding conviction language must be viewed as having impressed upon the jury the need to reach the subjective state of near certitude of guilt, see *Jackson* v. *Virginia*, 443 U. S. 307, 315, and thus as not having invited conviction on less than the constitutionally required proof. Moreover, in contrast to the situation in *Cage*, there is no reasonable likelihood that the jury here would have understood moral certainty to be disassociated from the evidence in the case, since the instruction explicitly told the jurors, among other things, that their conclusion had to be based upon such evidence. Accordingly, although this Court does not condone the use of the antiquated "moral certainty" phrase, its use in the context of the instructions as a whole cannot be said to have rendered those instructions unconstitutional. Pp. 10–17.

(d) Sandoval's objection to the portion of the charge declaring that a reasonable doubt is "not a mere possible doubt" is also rejected. That the instruction properly uses "possible" in the sense of fanciful is made clear by the fact that it also notes that everything "is open to some possible or imaginary doubt." P. 17.

(e) The instructions given in Victor's case defined reasonable doubt as, among other things, a doubt that will not permit an abiding conviction, "to a moral certainty," of the accused's guilt, and an "actual and substantial doubt" that is not excluded by the "strong probabilities of the case." Pp. 17–19.

(f) Victor's primary argument—that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal—is rejected. Any ambiguity is removed by reading the phrase in question in context: The Victor charge immediately distinguished an "actual and substantial doubt" from one "arising from mere possibility, from bare imagination, or from fanciful conjecture," and thereby informed the jury that a reasonable doubt is something more than a speculative one, which is an unexceptionable proposition. *Cage, supra,* at 41, distinguished. Moreover, the instruction defined a reasonable doubt alternatively as a doubt that would cause a reasonable person to hesitate to act, a formulation which this Court has repeatedly approved and which gives a commonsense benchmark for just how substantial a reasonable doubt must be. Pp. 19–21.

(g) The inclusion of the "moral certainty" phrase in the Victor charge did not render the instruction unconstitutional. In contrast to the situation in *Cage,* a sufficient context to lend meaning to the phrase was provided by the rest of the Victor charge, which equated a doubt sufficient to preclude moral certainty with a doubt that would cause a reasonable person to hesitate to act, and told the jurors that they must have an abiding conviction of Victor's guilt, must be convinced of such guilt "after full, fair, and impartial consideration of all the evidence," should be governed solely by that evidence in determining factual issues, and should not indulge in speculation, conjectures, or unsupported inferences. Pp. 21–22.

(h) The reference to "strong probabilities" in the Victor charge does not unconstitutionally understate the government's burden, since the charge also informs the jury that the probabilities must be strong enough to prove guilt beyond a reasonable doubt. See *Dunbar* v. *United States,* 156 U. S. 185, 199. P. 22.

No. 92–8894, 242 Neb. 306, 494 N. W. 2d 565, and No. 92–9049, 4 Cal. 4th 155, 841 P. 2d 862, affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, and IV, in which REHNQUIST, C. J., and STEVENS, SCALIA, KENNEDY, and

THOMAS, JJ., joined in full and in which GINSBURG, J., joined as to Parts III–B and IV. KENNEDY, J., filed a concurring opinion, *post*, p. 23. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 23. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in all but Part II of which SOUTER, J., joined, *post*, p. 28.

Mark A. Weber argued the cause and filed briefs for petitioner in No. 92–8894. *Eric S. Multhaup*, by appointment of the Court, 510 U. S. 942, argued the cause for petitioner in No. 92–9049. With him on the briefs was *Kathy M. Chavez.*

Don Stenberg, Attorney General of Nebraska, argued the cause for respondent in No. 92–8894. With him on the brief was *J. Kirk Brown*, Assistant Attorney General. *Daniel E. Lungren*, Attorney General of California, argued the cause for respondent in No. 92–9049. With him on the brief were *George Williamson*, Chief Assistant Attorney General, *Carol Wendelin Pollack*, Senior Assistant Attorney General, and *Susan Lee Frierson, Sharlene A. Honnaka, Donald E. De Nicola*, and *Sharon Wooden Richard*, Deputy Attorneys General.†

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†Briefs of *amici curiae* urging affirmance in both cases were filed for the United States by *Solicitor General Days, Assistant Attorney General Harris, Deputy Solicitor General Bryson*, and *Paul J. Larkin, Jr.*; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance in No. 92–9049 were filed for the Commonwealth of Massachusetts et al. by *Scott Harshbarger*, Attorney General of Massachusetts, and *Pamela L. Hunt* and *Gregory I. Massing*, Assistant Attorneys General, and by the Attorneys General for their respective jurisdictions as follows: *James H. Evans* of Alabama, *Larry EchoHawk* of Idaho, *Pamela Carter* of Indiana, *Jeremiah W. (Jay) Nixon* of Missouri, *Joseph P. Mazurek* of Montana, *Frankie Sue Del Papa* of Nevada, *Michael F. Easley* of North Carolina, *Lee Fisher* of Ohio, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Charles W. Burson* of Tennessee, and *Elizabeth Barrett-Anderson* of Guam; and for the California District Attorneys' Association by *Gil Garcetti* and *Brent Riggs.*

JUSTICE O'CONNOR delivered the opinion of the Court.*

The government must prove beyond a reasonable doubt every element of a charged offense. *In re Winship*, 397 U. S. 358 (1970). Although this standard is an ancient and honored aspect of our criminal justice system, it defies easy explication. In these cases, we consider the constitutionality of two attempts to define "reasonable doubt."

I

The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. *Hopt* v. *Utah*, 120 U. S. 430, 440–441 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson* v. *Virginia*, 443 U. S. 307, 320, n. 14 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. *Taylor* v. *Kentucky*, 436 U. S. 478, 485–486 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Holland* v. *United States*, 348 U. S. 121, 140 (1954).

In only one case have we held that a definition of reasonable doubt violated the Due Process Clause. *Cage* v. *Louisiana*, 498 U. S. 39 (1990) *(per curiam)*. There, the jurors were told:

> "'[A reasonable doubt] is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible

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*JUSTICES BLACKMUN and SOUTER join only Part II of this opinion. JUSTICE GINSBURG joins only Parts II, III–B, and IV.

> doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*'" *Id.*, at 40 (emphasis added by this Court in *Cage*).

We held that the highlighted portions of the instruction rendered it unconstitutional:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.*, at 41.

In a subsequent case, we made clear that the proper inquiry is not whether the instruction "could have" been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it. *Estelle* v. *McGuire*, 502 U. S. 62, 72, and n. 4 (1991). The constitutional question in the present cases, therefore, is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard. Although other courts have held that instructions similar to those given at petitioners' trials violate the Due Process Clause, see *State* v. *Bryant*, 334 N. C. 333, 432 S. E. 2d 291 (1993), cert. pending, No. 93–753; *Morley* v. *Stenberg*, 828 F. Supp. 1413 (Neb. 1993), both the Nebraska and the California Supreme Courts held that the instructions were constitutional. We granted certiorari, 509 U. S. 954 (1993), and now affirm both judgments.

II

On October 14, 1984, petitioner Sandoval shot three men, two of them fatally, in a gang-related incident in Los Angeles. About two weeks later, he entered the home of a man who had given information to the police about the murders and shot him dead; Sandoval then killed the man's wife because she had seen him murder her husband. Sandoval was convicted on four counts of first degree murder. The jury found that Sandoval personally used a firearm in the commission of each offense, and found the special circumstance of multiple murder. Cal. Penal Code Ann. § 12022.5 (West 1992) and Cal. Penal Code Ann. § 190.2(a)(3) (West 1988). He was sentenced to death for murdering the woman and to life in prison without possibility of parole for the other three murders. The California Supreme Court affirmed the convictions and sentences. 4 Cal. 4th 155, 841 P. 2d 862 (1992).

The jury in Sandoval's case was given the following instruction on the government's burden of proof:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.
>
> "Reasonable doubt is defined as follows: It is *not a mere possible doubt;* because everything relating to human affairs, and *depending on moral evidence,* is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, *to a moral certainty,* of the truth of the charge." App. in No. 92–9049, p. 49 (emphasis added) (Sandoval App.).

The California Supreme Court rejected Sandoval's claim that the instruction, particularly the highlighted passages, violated the Due Process Clause. 4 Cal. 4th, at 185–186, 841 P. 2d, at 878.

The instruction given in Sandoval's case has its genesis in a charge given by Chief Justice Shaw of the Massachusetts Supreme Judicial Court more than a century ago:

> "[W]hat is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt." *Commonwealth* v. *Webster*, 59 Mass. 295, 320 (1850).

The *Webster* charge is representative of the time when "American courts began applying [the beyond a reasonable doubt standard] in its modern form in criminal cases." *Apo-*

daca v. *Oregon,* 406 U. S. 404, 412, n. 6 (1972) (plurality opinion). See also *Perovich* v. *United States,* 205 U. S. 86, 92 (1907) (approving *Webster* charge). In *People* v. *Strong,* 30 Cal. 151, 155 (1866), the California Supreme Court characterized the *Webster* instruction as "probably the most satisfactory definition ever given to the words 'reasonable doubt' in any case known to criminal jurisprudence." In *People* v. *Paulsell,* 115 Cal. 6, 12, 46 P. 734 (1896), the court cautioned state trial judges against departing from that formulation. And in 1927, the state legislature adopted the bulk of the *Webster* instruction as a statutory definition of reasonable doubt. Cal. Penal Code Ann. § 1096 (West 1985); see California Jury Instructions, Criminal, No. 2.90 (4th ed. 1979). Indeed, the California Legislature has directed that "the court may read to the jury section 1096 of this code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." § 1096a. The statutory instruction was given in Sandoval's case.

The California instruction was criticized in *People* v. *Brigham,* 25 Cal. 3d 283, 292–316, 599 P. 2d 100, 106–121 (1979) (Mosk, J., concurring). Justice Mosk apparently did not think the instruction was unconstitutional, but he "urge[d] the Legislature to reconsider its codification." *Id.,* at 293, 599 P. 2d, at 106. The California Assembly and Senate responded by requesting the committee on jury instructions of the Los Angeles Superior Court "to study alternatives to the definition of 'reasonable doubt' set forth in Section 1096 of the Penal Code, and to report its findings and recommendations to the Legislature." Cal. Assem. Con. Res. No. 148, 1986 Cal. Stats. 5634. The committee recommended that the legislature retain the statutory definition unmodified, see Alternative Definitions of Reasonable Doubt: A Report of the Committee on Standard Jury Instructions—Criminal to the California Legislature (May 22, 1987), and § 1096 has not been changed.

A

Sandoval's primary objection is to the use of the phrases "moral evidence" and "moral certainty" in the instruction. As noted, this part of the charge was lifted verbatim from Chief Justice Shaw's *Webster* decision; some understanding of the historical context in which that instruction was written is accordingly helpful in evaluating its continuing validity.

By the beginning of the Republic, lawyers had borrowed the concept of "moral evidence" from the philosophers and historians of the 17th and 18th centuries. See generally B. Shapiro, "Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence, ch. 1 (1991). James Wilson, who was instrumental in framing the Constitution and who served as one of the original Members of this Court, explained in a 1790 lecture on law that "evidence . . . is divided into two species—demonstrative and moral." 1 Works of James Wilson 518 (J. Andrews ed. 1896). Wilson went on to explain the distinction thus:

> "Demonstrative evidence has for its subject abstract and necessary truths, or the unchangeable relations of ideas. Moral evidence has for its subject the real but contingent truths and connections, which take place among things actually existing. . . .
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> . . . . .
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> "In moral evidence, there not only may be, but there generally is, contrariety of proofs: in demonstrative evidence, no such contrariety can take place. . . . [T]o suppose that two contrary demonstrations can exist, is to suppose that the same proposition is both true and false: which is manifestly absurd. With regard to moral evidence, there is, for the most part, real evidence on both sides. On both sides, contrary presumptions, contrary

> testimonies, contrary experiences must be balanced." *Id.*, at 518–519.

A leading 19th century treatise observed that "[m]atters of fact are proved by *moral evidence* alone; . . . [i]n the ordinary affairs of life, we do not require demonstrative evidence, . . . and to insist upon it would be unreasonable and absurd." 1 S. Greenleaf, Law of Evidence 3–4 (13th ed. 1876).

The phrase "moral certainty" shares an epistemological pedigree with moral evidence. See generally Shapiro, "To A Moral Certainty": Theories of Knowledge and Anglo-American Juries 1600–1850, 38 Hastings L. J. 153 (1986). Moral certainty was the highest degree of certitude based on such evidence. In his 1790 lecture, James Wilson observed:

> "In a series of moral evidence, the inference drawn in the several steps is not necessary; nor is it impossible that the premises should be true, while the conclusion drawn from them is false.
>
> ". . . In moral evidence, we rise, by an insensible gradation, from possibility to probability, and from probability to the highest degree of moral certainty." 1 Works of James Wilson, *supra*, at 519.

At least one early treatise explicitly equated moral certainty with proof beyond a reasonable doubt:

> "Evidence which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact. . . .
>
> "Even the most direct evidence can produce nothing more than such a high degree of probability as amounts to moral certainty. From the highest degree it may decline, by an infinite number of gradations, until it produce in the mind nothing more than a mere preponderance of assent in favour of the particular fact." T. Starkie, Law of Evidence 478 (2d ed. 1833).

See also Greenleaf, *supra,* at 4 ("The most that can be affirmed of [things proved by moral evidence] is, that there is no reasonable doubt concerning them").

Thus, when Chief Justice Shaw penned the *Webster* instruction in 1850, moral certainty meant a state of subjective certitude about some event or occurrence. As the Massachusetts Supreme Judicial Court subsequently explained:

> "Proof 'beyond a reasonable doubt' . . . is proof 'to a moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible." *Commonwealth* v. *Costley,* 118 Mass. 1, 24 (1875).

Indeed, we have said that "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.'" *Fidelity Mut. Life Assn.* v. *Mettler,* 185 U. S. 308, 317 (1902), citing *Commonwealth* v. *Costley, supra.* See also *Wilson* v. *United States,* 232 U. S. 563, 570 (1914) (approving reasonable doubt instruction cast in terms of moral certainty); *Miles* v. *United States,* 103 U. S. 304, 309, 312 (1881).

We recognize that the phrase "moral evidence" is not a mainstay of the modern lexicon, though we do not think it means anything different today than it did in the 19th century. The few contemporary dictionaries that define moral evidence do so consistently with its original meaning. See, *e. g.,* Webster's New Twentieth Century Dictionary 1168 (2d ed. 1979) ("based on general observation of people, etc. rather than on what is demonstrable"); Collins English Dictionary 1014 (3d ed. 1991) (similar); 9 Oxford English Dictionary 1070 (2d ed. 1989) (similar).

Moreover, the instruction itself gives a definition of the phrase. The jury was told that "everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt"—in other words, that absolute certainty is unattainable in matters relating to human affairs. Moral evidence, in this sentence, can only mean empirical evidence offered to prove such matters—the proof introduced at trial.

This conclusion is reinforced by other instructions given in Sandoval's case. The judge informed the jurors that their duty was "to determine the facts of the case from the evidence received in the trial and not from any other source." Sandoval App. 38. The judge continued: "Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact." *Id.*, at 40. The judge also told the jurors that "you must not be influenced by pity for a defendant or by prejudice against him," and that "[y]ou must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.*, at 39. These instructions correctly pointed the jurors' attention to the facts of the case before them, not (as Sandoval contends) the ethics or morality of Sandoval's criminal acts. Accordingly, we find the reference to moral evidence unproblematic.

We are somewhat more concerned with Sandoval's argument that the phrase "moral certainty" has lost its historical meaning, and that a modern jury would understand it to allow conviction on proof that does not meet the beyond a reasonable doubt standard. Words and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror. And although some contemporary dictionaries contain definitions of moral certainty similar to the 19th century understanding of the phrase, see Webster's Third New International Dictionary 1468 (1981) ("virtual rather than actual, immediate, or completely demonstrable"); 9 Oxford English Dictionary, *supra*, at 1070 ("a degree of probability so great as to admit of no reasonable doubt"), we are willing to accept Sandoval's premise that "moral certainty," standing alone, might not be recognized by modern jurors as a synonym for "proof beyond a reasonable doubt." But it does not necessarily follow that the California instruction is unconstitutional.

Sandoval first argues that moral certainty would be understood by modern jurors to mean a standard of proof lower than beyond a reasonable doubt. In support of this proposition, Sandoval points to contemporary dictionaries that define moral certainty in terms of probability. *E. g.*, Webster's New Twentieth Century Dictionary, *supra*, at 1168 ("based on strong probability"); Random House Dictionary of the English Language 1249 (2d ed. 1983) ("resting upon convincing grounds of probability"). But the beyond a reasonable doubt standard is itself probabilistic. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened." *In re Winship*, 397 U. S., at 370 (Harlan, J., concurring) (emphasis in original). The problem is not that moral certainty may be understood in terms of probability, but that a jury might understand the phrase to mean something less than the very high level of probability required by the Constitution in criminal cases.

Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction given in Sandoval's case lends content to the phrase. The jurors were told that they must have "an abiding conviction, to a moral certainty, of the truth of the charge." Sandoval App. 49. An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's burden of proof. *Hopt* v. *Utah*, 120 U. S., at 439 ("The word 'abiding' here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence"); see Criminal Jury Instructions: District of Columbia 46 (3d H. Greene & T. Guidoboni ed. 1978). And the judge had already informed the jury that matters relating to human affairs are proved by moral evidence, see *supra*, at 13; giving the same meaning to the word moral in this part of the instruction, moral certainty can only mean certainty with respect to human affairs. As used in this instruction, therefore, we are satisfied that the reference to moral certainty, in conjunction with the abiding conviction language, "impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." *Jackson* v. *Virginia*, 443 U. S., at 315. Accordingly, we reject Sandoval's contention that the moral certainty element of the California instruction invited the jury to convict him on proof below that required by the Due Process Clause.

Sandoval's second argument is a variant of the first. Accepting that the instruction requires a high level of confidence in the defendant's guilt, Sandoval argues that a juror might be convinced to a moral certainty that the defendant is guilty even though the government has failed to *prove* his guilt beyond a reasonable doubt. A definition of moral certainty in a widely used modern dictionary lends support to this argument, see American Heritage Dictionary 1173 (3d ed. 1992) ("Based on strong likelihood or firm conviction, rather than on the actual evidence"), and we do not gainsay its force. As we have noted, "[t]he constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on '*proof* beyond a reasonable doubt.'" *Jackson* v. *Virginia*, *supra*, at 315 (emphasis in original). Indeed, in *Cage* we contrasted "moral certainty" with "evidentiary certainty." 498 U. S., at 41.

But the moral certainty language cannot be sequestered from its surroundings. In the *Cage* instruction, the jurors were simply told that they had to be morally certain of the defendant's guilt; there was nothing else in the instruction to lend meaning to the phrase. Not so here. The jury in Sandoval's case was told that a reasonable doubt is "that state of the case which, *after the entire comparison and consideration of all the evidence,* leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Sandoval App. 49 (emphasis added). The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case. Other instructions reinforced this message. The jury was told "to determine the facts of the case from the evidence received in the trial and not from any other source." *Id.*, at 38. The judge continued that "you must not be influenced by pity for a defendant or by prejudice against him. . . . You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id.*, at 39. Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case.

We do not think it reasonably likely that the jury understood the words "moral certainty" either as suggesting a standard of proof lower than due process requires or as allowing conviction on factors other than the government's proof. At the same time, however, we do not condone the use of the phrase. As modern dictionary definitions of moral certainty attest, the common meaning of the phrase has changed since it was used in the *Webster* instruction, and it may continue to do so to the point that it conflicts with the *Winship* standard. Indeed, the definitions of reasonable doubt most widely used in the federal courts do not contain any reference to moral certainty. See Federal Judicial Center, Pattern Criminal Jury Instructions 28 (1988); 1 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 11.14 (3d ed. 1977). But we have no supervisory power over the state courts, and in the context of the instructions as a whole we cannot say that the use of the phrase rendered the instruction given in Sandoval's case unconstitutional.

B

Finally, Sandoval objects to the portion of the charge in which the judge instructed the jury that a reasonable doubt is "not a mere possible doubt." The *Cage* instruction included an almost identical reference to "not a mere possible doubt," but we did not intimate that there was anything wrong with that part of the charge. See 498 U. S., at 40. That is because "[a] 'reasonable doubt,' at a minimum, is one based upon 'reason.'" *Jackson* v. *Virginia, supra,* at 317. A fanciful doubt is not a reasonable doubt. As Sandoval's defense attorney told the jury: "Anything can be possible . . . . [A] planet could be made out of blue cheese. But that's really not in the realm of what we're talking about." Sandoval App. 79 (excerpt from closing argument). That this is the sense in which the instruction uses "possible" is made clear from the final phrase of the sentence, which notes that everything "is open to some possible or imaginary doubt." We therefore reject Sandoval's challenge to this portion of the instruction as well.

III

On December 26, 1987, petitioner Victor went to the Omaha home of an 82-year-old woman for whom he occasionally did gardening work. Once inside, he beat her with a pipe and cut her throat with a knife, killing her. Victor was convicted of first degree murder. A three-judge panel found the statutory aggravating circumstances that Victor had previously been convicted of murder, Neb. Rev. Stat. § 29–2523(1)(a) (1989), and that the murder in this case was especially heinous, atrocious, and cruel, § 29–2523(1)(d). Finding none of the statutory mitigating circumstances, the panel sentenced Victor to death. The Nebraska Supreme Court affirmed the conviction and sentence. *State* v. *Victor*, 235 Neb. 770, 457 N. W. 2d 431 (1990), cert. denied, 498 U. S. 1127 (1991).

At Victor's trial, the judge instructed the jury that "[t]he burden is always on the State to prove beyond a reasonable doubt all of the material elements of the crime charged, and this burden never shifts." App. in No. 92–8894, p. 8 (Victor App.). The charge continued:

> "'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the *strong probabilities of the case*, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." *Id.*, at 11 (emphasis added).

On state postconviction review, the Nebraska Supreme Court rejected Victor's contention that the instruction, particularly the emphasized phrases, violated the Due Process Clause. 242 Neb. 306, 310–311, 494 N. W. 2d 565, 569 (1993). Because the last state court in which review could be had considered Victor's constitutional claim on the merits, it is properly presented for our review despite Victor's failure to object to the instruction at trial or raise the issue on direct appeal. See, *e. g.*, *Ylst* v. *Nunnemaker*, 501 U. S. 797, 801 (1991).

The instruction given in Victor's case can be traced to two separate lines of cases. Much of the charge is taken from Chief Justice Shaw's *Webster* instruction. See *Carr* v. *State*, 23 Neb. 749, 752–753, 37 N. W. 630, 631–632 (1888) (approving the use of *Webster*). The rest derives from a series of decisions approving instructions cast in terms of an "actual doubt" that would cause a reasonable person to hesitate to act. See, *e. g.*, *Whitney* v. *State*, 53 Neb. 287, 298, 73 N. W. 696, 699 (1898); *Willis* v. *State*, 43 Neb. 102, 110–111, 61 N. W. 254, 256 (1894); *Polin* v. *State*, 14 Neb. 540, 546–547, 16 N. W. 898, 900–901 (1883). In 1968, a committee appointed by the Nebraska Supreme Court developed model jury instructions; a court rule in effect at the time Victor was tried directed that those instructions were to be used where applicable. Nebraska Jury Instructions IX (1969) (N. J. I.). The model instruction on reasonable doubt, N. J. I. 14.08, is the one given at Victor's trial. (Since Victor was tried, a revised reasonable doubt instruction, N. J. I. 2d Crim. 2.0 (1992), has been adopted, although the prior version may still be used.)

A

Victor's primary argument is that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. We agree that this construction is somewhat problematic. On the one hand, "substantial" means "not seeming or imaginary"; on the other, it means "that specified to a large degree." Webster's Third New International Dictionary, at 2280. The former is unexceptionable, as it informs the jury only that a reasonable doubt is something more than a speculative one; but the latter could imply a doubt greater than required for acquittal under *Winship.* Any ambiguity, however, is removed by reading the phrase in the context of the sentence in which it appears: "A reasonable doubt is an actual and substantial doubt . . . *as distinguished from* a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." Victor App. 11 (emphasis added).

This explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction. We did say in that case that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U. S., at 41. But we did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional. Cf. *Taylor* v. *Kentucky,* 436 U. S., at 488 (defining reasonable doubt as a substantial doubt, "though perhaps *not in itself reversible error,* often has been criticized as confusing") (emphasis added). Rather, we were concerned that the jury would interpret the term "substantial doubt" in parallel with the preceding reference to "grave uncertainty," leading to an overstatement of the doubt necessary to acquit. In the instruction given in Victor's case, the context makes clear that "substantial" is used in the sense of existence rather than magnitude of the doubt, so the same concern is not present.

In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act. This is a formulation we have repeatedly approved, *Holland* v. *United States,* 348 U. S., at 140; cf. *Hopt* v. *Utah,* 120 U. S., at 439–441, and to the extent the word "substantial" denotes the quantum of doubt necessary for acquittal, the hesitate to act standard gives a commonsense benchmark for just how substantial such a doubt must be. We therefore do not think it reasonably likely that the jury would have interpreted this instruction to indicate that the doubt must be anything other than a reasonable one.

B

Victor also challenges the "moral certainty" portion of the instruction. In another case involving an identical instruction, the Nebraska Supreme Court distinguished *Cage* as follows: "[U]nder the *Cage* instruction a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction a juror is to vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists." *State* v. *Morley,* 239 Neb. 141, 155, 474 N. W. 2d 660, 670 (1991); see also 242 Neb., at 310–311, 494 N. W. 2d, at 569 (relying on *Morley*). We disagree with this reading of *Cage.* The moral certainty to which the *Cage* instruction referred was clearly related to the defendant's guilt; the problem in *Cage* was that the rest of the instruction provided insufficient context to lend meaning to the phrase. But the Nebraska instruction is not similarly deficient.

Instructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase "moral certainty" might be misunderstood in the abstract. See *supra,* at 14–15. The instruction also equated a doubt sufficient to preclude moral certainty with a doubt that would cause a reasonable person to hesitate to act. In other words, a juror morally certain of a fact would not hesitate to rely on it; and such a fact can fairly be said to have been proved beyond a reasonable doubt. Cf. *Hopt* v. *Utah, supra,* at 439–440. The jurors were told that they must be convinced of Victor's guilt "after full, fair, and impartial consideration of all the evidence." Victor App. 11. The judge also told them: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence." *Id.*, at 2. There is accordingly no reasonable likelihood that the jurors understood the reference to moral certainty to allow conviction on a standard insufficient to satisy *Winship*, or to allow conviction on factors other than the government's proof. Though we reiterate that we do not countenance its use, the inclusion of the "moral certainty" phrase did not render the instruction given in Victor's case unconstitutional.

C

Finally, Victor argues that the reference to "strong probabilities" in the instruction unconstitutionally understated the government's burden. But in the same sentence, the instruction informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt. We upheld a nearly identical instruction in *Dunbar* v. *United States*, 156 U. S. 185, 199 (1895): "While it is true that [the challenged instruction] used the words 'probabilities' and 'strong probabilities,' yet it emphasized the fact that those probabilities must be so strong as to exclude any reasonable doubt, and that is unquestionably the law" (citing *Hopt* v. *Utah, supra,* at 439). That conclusion has lost no force in the course of a century, and we therefore consider *Dunbar* controlling on this point.

IV

The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid defining reasonable doubt so as to lead the jury to convict on a lesser showing than due process requires. In these cases, however, we conclude that "taken as a whole, the instructions correctly conveyed the concept of reasonable doubt to the jury." *Holland* v. *United States, supra,* at 140. There is no reasonable likelihood that the jurors who determined petitioners' guilt applied the instructions in a way that violated the Constitution. The judgments in both cases are accordingly

Affirmed.

JUSTICE KENNEDY, concurring.

It was commendable for Chief Justice Shaw to pen an instruction that survived more than a century, but, as the Court makes clear, what once might have made sense to jurors has long since become archaic. In fact, some of the phrases here in question confuse far more than they clarify.

Though the reference to "moral certainty" is not much better, California's use of "moral evidence" is the most troubling, and to me seems quite indefensible. The derivation of the phrase is explained in the Court's opinion, but even with this help the term is a puzzle. And for jurors who have not had the benefit of the Court's research, the words will do nothing but baffle.

I agree that use of "moral evidence" in the California formulation is not fatal to the instruction here. I cannot understand, however, why such an unruly term should be used at all when jurors are asked to perform a task that can be of great difficulty even when instructions are altogether clear. The inclusion of words so malleable, because so obscure, might in other circumstances have put the whole instruction at risk.

With this observation, I concur in full in the opinion of the Court.

JUSTICE GINSBURG, concurring in part and concurring in the judgment.

I agree with the Court that the reasonable doubt instructions given in these cases, read as a whole, satisfy the Constitution's due process requirement. As the Court observes, the instructions adequately conveyed to the jurors that they should focus exclusively upon the evidence, see *ante*, at 13, 16, 21–22, and that they should convict only if they had an "abiding conviction" of the defendant's guilt, see *ante*, at 14, 21. I agree, further, with the Court's suggestion that the term "moral certainty," while not in itself so misleading as to render the instructions unconstitutional, should be avoided as an unhelpful way of explaining what reasonable doubt means. See *ante*, at 16, 22.

Similarly unhelpful, in my view, are two other features of the instruction given in Victor's case. That instruction begins by defining reasonable doubt as "such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon." App. in No. 92–8894, p. 11. A committee of distinguished federal judges, reporting to the Judicial Conference of the United States, has criticized this "hesitate to act" formulation

> "because the analogy it uses seems misplaced. In the decisions people make in the most important of their own affairs, resolution of conflicts about past events does not usually play a major role. Indeed, decisions we make in the most important affairs of our lives—choosing a spouse, a job, a place to live, and the like—generally involve a very heavy element of uncertainty and risk-taking. They are wholly unlike the decisions jurors ought to make in criminal cases." Federal Judicial Center, Pattern Criminal Jury Instructions 18–19 (1987) (commentary on instruction 21).

More recently, Second Circuit Chief Judge Jon O. Newman observed:

> "Although, as a district judge, I dutifully repeated [the 'hesitate to act' standard] to juries in scores of criminal trials, I was always bemused by its ambiguity. If the jurors encounter a doubt that would cause them to 'hesitate to act in a matter of importance,' what are they to do then? Should they decline to convict because they

> have reached a point of hesitation, or should they simply hesitate, then ask themselves whether, in their own private matters, they would resolve the doubt in favor of action, and, if so, continue on to convict?" Beyond "Reasonable Doubt," 68 N. Y. U. L. Rev. 201, 204 (1994) (James Madison Lecture, delivered at New York University Law School, Nov. 9, 1993).

Even less enlightening than the "hesitate to act" formulation is the passage of the *Victor* instruction counseling: "[The jury] may find an accused guilty upon the strong probabilities of the case, *provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable.*" App. in No. 92–8894, p. 11. If the italicized words save this part of the instruction from understating the prosecution's burden of proof, see *ante*, at 22, they do so with uninstructive circularity. Jury comprehension is scarcely advanced when a court "defines" reasonable doubt as "doubt . . . that is reasonable."

These and similar difficulties have led some courts to question the efficacy of any reasonable doubt instruction. At least two of the Federal Courts of Appeals have admonished their District Judges not to attempt a definition.* This Court, too, has suggested on occasion that prevailing definitions of "reasonable doubt" afford no real aid. See, *e. g.*, *Holland* v. *United States*, 348 U. S. 121, 140 (1954) ("'[a]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury'"),

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*See, *e. g.*, *United States* v. *Adkins*, 937 F. 2d 947, 950 (CA4 1991) ("This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof. . . . The only exception to our categorical disdain for definition is when the jury specifically requests it."); *United States* v. *Hall*, 854 F. 2d 1036, 1039 (CA7 1988) (upholding District Court's refusal to provide definition, despite jury's request, because "at best, definitions of reasonable doubt are unhelpful to a jury . . . . An attempt to define reasonable doubt presents a risk without any real benefit.").

quoting *Miles* v. *United States,* 103 U. S. 304, 312 (1881); *Hopt* v. *Utah,* 120 U. S. 430, 440–441 (1887) ("The rule may be, and often is, rendered obscure by attempts at definition, which serve to create doubts instead of removing them."). But we have never held that the concept of reasonable doubt is undefinable, or that trial courts should not, as a matter of course, provide a definition. Nor, contrary to the Court's suggestion, see *ante,* at 5, have we ever held that the Constitution does not require trial courts to define reasonable doubt.

Because the trial judges in fact defined reasonable doubt in both jury charges we review, we need not decide whether the Constitution required them to do so. Whether or not the Constitution so requires, however, the argument for defining the concept is strong. While judges and lawyers are familiar with the reasonable doubt standard, the words "beyond a reasonable doubt" are not self-defining for jurors. Several studies of jury behavior have concluded that "jurors are often confused about the meaning of reasonable doubt" when that term is left undefined. See Note, Defining Reasonable Doubt, 90 Colum. L. Rev. 1716, 1723 (1990) (citing studies). Thus, even if definitions of reasonable doubt are necessarily imperfect, the alternative—refusing to define the concept at all—is not obviously preferable. Cf. Newman, *supra,* at 205–206 ("I find it rather unsettling that we are using a formulation that we believe will become less clear the more we explain it.").

Fortunately, the choice need not be one between two kinds of potential juror confusion—on one hand, the confusion that may be caused by leaving "reasonable doubt" undefined, and on the other, the confusion that might be induced by the anachronism of "moral certainty," the misplaced analogy of "hesitation to act," or the circularity of "doubt that is reasonable." The Federal Judicial Center has proposed a definition of reasonable doubt that is clear, straightforward, and accurate. That instruction reads:

> "[T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty." Federal Judicial Center, Pattern Criminal Jury Instructions, at 17–18 (instruction 21).

This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.

I recognize, however, that this Court has no supervisory powers over the state courts, see *ante,* at 17, and that the test we properly apply in evaluating the constitutionality of a reasonable doubt instruction is not whether we find it exemplary; instead, we inquire only whether there is a "reasonable likelihood that the jury understood the instructio[n] to allow conviction based on proof insufficient to meet" the reasonable doubt standard. See *ante*, at 6. On that understanding, I join Parts II, III–B, and IV of the Court's opinion and concur in its judgment.

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins in all but Part II, concurring in part and dissenting in part.

In *Cage* v. *Louisiana*, 498 U. S. 39 (1990), this Court, by a *per curiam* opinion, found a jury instruction defining reasonable doubt so obviously flawed that the resulting state-court judgment deserved summary reversal. The majority today purports to uphold and follow *Cage*, but plainly falters in its application of that case. There is no meaningful difference between the jury instruction delivered at Victor's trial and the jury instruction issued in *Cage*, save the fact that the jury instruction in Victor's case did not contain the two words "grave uncertainty." But the mere absence of these two words can be of no help to the State, since there is other language in the instruction that is equally offensive to due process. I therefore dissent from the Court's opinion and judgment in No. 92–8894, *Victor* v. *Nebraska*.

I

Our democracy rests in no small part on our faith in the ability of the criminal justice system to separate those who are guilty from those who are not. This is a faith which springs fundamentally from the requirement that unless guilt is established beyond all reasonable doubt, the accused shall go free. It was not until 1970, however, in *In re Winship*, 397 U. S. 358, that the Court finally and explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.*, at 364. In *Winship*, the Court recounted the long history of the reasonable-doubt standard, noting that it "dates at least from our early years as a Nation." *Id.*, at 361. The Court explained that any "society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt." *Id.*, at 363–364.

Despite the inherent appeal of the reasonable-doubt standard, it provides protection to the innocent only to the extent that the standard, in reality, is an enforceable rule of law. To be a meaningful safeguard, the reasonable-doubt standard must have a tangible meaning that is capable of being understood by those who are required to apply it. It must be stated accurately and with the precision owed to those whose liberty or life is at risk. Because of the extraordinarily high stakes in criminal trials, "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.*, at 364.

When reviewing a jury instruction that defines "reasonable doubt," it is necessary to consider the instruction as a whole and to give the words their common and ordinary meaning. *Estelle* v. *McGuire*, 502 U. S. 62, 72 (1991). It is not sufficient for the jury instruction merely to be susceptible to an interpretation that is technically correct. The important question is whether there is a "reasonable likelihood" that the jury was misled or confused by the instruction, and therefore applied it in a way that violated the Constitution. *Boyde* v. *California*, 494 U. S. 370, 380 (1990). Any jury instruction defining "reasonable doubt" that suggests an improperly high degree of doubt for acquittal or an improperly low degree of certainty for conviction offends due process. Either misstatement of the reasonable-doubt standard is prejudicial to the defendant, as it "vitiates all the jury's findings," see *Sullivan* v. *Louisiana*, 508 U. S. 275, 281 (1993) (emphasis deleted), and removes the only constitutionally appropriate predicate for the jury's verdict.

A

In a Louisiana trial court, Tommy Cage was convicted of first-degree murder and sentenced to death. On appeal to the Supreme Court of Louisiana, he argued, among other things, that the reasonable-doubt instruction used in the guilt phase of his trial violated the Due Process Clause of the Fourteenth Amendment. See *State* v. *Cage*, 554 So. 2d 39 (1989). The instruction in relevant part provided:

> "If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such a doubt as would give rise to a *grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an *actual substantial doubt*. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*." *Id.*, at 41 (second emphasis added; first and third emphases in original).

The Louisiana Supreme Court affirmed Cage's conviction, reasoning that, although some of the language "might overstate the requisite degree of uncertainty and confuse the jury," the charge as a whole was understandable to "reasonable persons of ordinary intelligence," and therefore constitutional. *Ibid.*

We granted certiorari and summarily reversed. *Cage* v. *Louisiana*, 498 U. S. 39 (1990). The Court noted that some of the language in the instruction was adequate, but ruled that the phrases "actual substantial doubt" and "grave uncertainty" suggested a "higher degree of doubt than is required for acquittal under the reasonable-doubt standard," and that those phrases taken together with the reference to "moral certainty," rather than "evidentiary certainty," rendered the instruction as a whole constitutionally defective. *Id.*, at 41.

Clarence Victor, petitioner in No. 92–8894, also was convicted of first-degree murder and sentenced to death. The instruction in his case reads as follows:

> "'Reasonable doubt' is such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a *moral certainty*, of the guilt of the accused. At the same time absolute or mathematical certainty is not required. *You may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken. You may find an accused guilty upon the strong probabilities of the case,* provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an *actual and substantial doubt* reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture." App. in No. 92–8894, p. 11 (emphases added).

The majority's attempt to distinguish this instruction from the one employed in *Cage* is wholly unpersuasive. Both instructions equate "substantial doubt" with reasonable doubt, and refer to "moral certainty" rather than "evidentiary certainty." And although Victor's instruction does not contain the phrase "grave uncertainty," the instruction contains language that has an equal potential to mislead, including the invitation to the jury to convict based on the "strong probabilities" of the case and the overt effort to dissuade jurors from acquitting when they are "fully aware that possibly they may be mistaken." Nonetheless, the majority argues that "substantial doubt" has a meaning in Victor's instruction different from that in Cage's instruction, and that the "moral certainty" language is sanitized by its context. The majority's approach seems to me to fail under its own logic.

B

First, the majority concedes, as it must, that equating reasonable doubt with substantial doubt is "somewhat problematic" since one of the common definitions of "substantial" is "'that specified to a large degree.'" *Ante,* at 19. But the majority insists that the jury did not likely interpret the word "substantial" in this manner because Victor's instruction, unlike Cage's instruction, used the phrase "substantial doubt" as a means of distinguishing reasonable doubt from mere conjecture. According to the majority, "[t]his explicit distinction between a substantial doubt and a fanciful conjecture was not present in the *Cage* instruction," and thus, read in context, the use of "substantial doubt" in Victor's instruction is less problematic. *Ante,* at 20.

A casual reading of the *Cage* instruction reveals the majority's false premise. The *Cage* instruction plainly states that a reasonable doubt is a doubt "founded upon a real tangible substantial basis and not upon mere caprice and conjecture." See 498 U. S., at 40. The *Cage* instruction also used the "substantial doubt" language to distinguish a reasonable doubt from "a mere possible doubt." *Ibid.* ("'A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt*'"). Thus, the reason the Court condemned the "substantial doubt" language in *Cage* had nothing to do with the absence of appropriate contrasting language; rather, the Court condemned the language for precisely the reason it gave: "[T]he words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Id.*, at 41. In short, the majority's speculation that the jury in Victor's case interpreted "substantial" to mean something other than "that specified to a large degree" simply because the word "substantial" is used at one point to distinguish mere conjecture is unfounded and is foreclosed by *Cage* itself.

The majority further attempts to minimize the obvious hazards of equating "substantial doubt" with reasonable doubt by suggesting that, in *Cage*, it was the combined use of "substantial doubt" and "grave uncertainty," "in parallel," that rendered the use of the phrase "substantial doubt" unconstitutional. *Ante*, at 20. This claim does not withstand scrutiny. The Court in *Cage* explained that *both* "substantial doubt" and "grave uncertainty" overstated the degree of doubt necessary to acquit, and found that it was the use of those words in conjunction with the misleading phrase "moral certainty" that violated due process. The Court's exact words were:

> "It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." 498 U. S., at 41.

Clearly, the Court was not preoccupied with the relationship between "substantial doubt" and "grave uncertainty." The

Court instead endorsed the universal opinion of the Courts of Appeals that equating reasonable doubt with "substantial doubt" is improper and potentially misleading in that it overstates the degree of doubt required for acquittal under the reasonable-doubt standard. See, *e. g.*, *Smith* v. *Bordenkircher*, 718 F. 2d 1273, 1276 (CA4 1983) (noting agreement with the "uniformly disapproving" view of the appellate courts regarding the use of the "substantial doubt" language), cert. denied, 466 U. S. 976 (1984); see also *Taylor* v. *Kentucky*, 436 U. S. 478, 488 (1978) ("[Equating 'substantial doubt' with reasonable doubt], though perhaps not in itself reversible error, often has been criticized as confusing").*

In a final effort to distinguish the use of the phrase "substantial doubt" in this case from its use in *Cage*, the majority states: "In any event, the instruction provided an alternative definition of reasonable doubt: a doubt that would cause a reasonable person to hesitate to act." *Ante*, at 20. The Court reasons that since this formulation has been upheld in other contexts, see *Holland* v. *United States*, 348 U. S. 121, 140 (1954), this "alternative" statement makes it unlikely that the jury would interpret "substantial" to mean "to a large degree."

To begin with, I note my general agreement with JUSTICE GINSBURG's observation that the "hesitate to act" language is far from helpful, and may in fact make matters worse by analogizing the decision whether to convict or acquit a defendant to the frequently high-risk personal decisions people must make in their daily lives. See *ante*, at 24 (opinion

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*Despite the overwhelming disapproval of the use of the phrase "substantial doubt" by appellate courts, some state trial courts continue to employ the language when instructing jurors. See *Bordenkircher*, 718 F. 2d, at 1279 (dissenting opinion) ("As the majority has forthrightly pointed out, a 'good and substantial doubt' instruction has evoked a 'uniformly disapproving' response from appellate courts . . . . Evidently the slight slaps on the wrist followed by affirmance of the convictions have not served the hoped for end of correction of the error *in futuro*").

concurring in part and concurring in judgment). But even assuming this "hesitate to act" language is in some way helpful to a jury in understanding the meaning of reasonable doubt, the existence of an "alternative" and accurate definition of reasonable doubt somewhere in the instruction does not render the instruction lawful if it is "reasonably likely" that the jury would rely on the faulty definition during its deliberations. *Boyde,* 494 U. S., at 380. *Cage* itself contained proper statements of the law with respect to what is required to convict or acquit a defendant, but this language could not salvage the instruction since it remained reasonably likely that, despite the proper statements of law, the jury understood the instruction to require "a higher degree of doubt than is required for acquittal under the reasonable doubt standard." 498 U. S., at 41.

In my view, the predominance of potentially misleading language in Victor's instruction made it likely that the jury interpreted the phrase "substantial doubt" to mean that a "large" doubt, as opposed to a merely reasonable doubt, is required to acquit a defendant. It seems that a central purpose of the instruction is to minimize the jury's sense of responsibility for the conviction of those who may be innocent. The instruction goes out of its way to assure jurors that "[y]ou may be convinced of the truth of a fact beyond a reasonable doubt and yet be fully aware that possibly you may be mistaken"; and then, after acquainting jurors with the possibility that their consciences will be unsettled after convicting the defendant, the instruction states that the jurors should feel free to convict based on the "strong probabilities of the case." Viewed as a whole, the instruction is geared toward assuring jurors that although they may be mistaken, they are to make their decision on those "strong probabilities," and only a "substantial doubt" of a defendant's guilt should deter them from convicting.

The majority dismisses the potentially harmful effects of the "strong probabilities" language on the ground that a "nearly identical instruction" was upheld by the Court a century ago. See *ante*, at 22, citing *Dunbar* v. *United States*, 156 U. S. 185, 199 (1895). But the instruction in *Dunbar* did not equate reasonable doubt with "substantial doubt," nor did it contain the phrase "moral certainty." As the majority appreciates elsewhere in its opinion, challenged jury instructions must be considered in their entirety. *Ante*, at 5, quoting *Holland*, 348 U. S., at 140 ("'[T]aken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury'"). Rather than examining the jury instruction as a whole, the majority parses it, ignoring the relationship between the challenged phrases as well as their cumulative effect.

Considering the instruction in its entirety, it seems fairly obvious to me that the "strong probabilities" language increased the likelihood that the jury understood "substantial doubt" to mean "to a large degree." Indeed, the jury could have a reasonable doubt about a defendant's guilt but still find that the "strong probabilities" are in favor of conviction. Only when a reasonable doubt is understood to be a doubt "to a large degree" does the "strong probabilities" language begin to make sense. A Nebraska Federal District Court recently observed: "The word 'probability' brings to mind terms such as 'chance,' 'possibility,' 'likelihood' and 'plausibility'—none of which appear to suggest the high level of certainty which is required to be convinced of a defendant's guilt 'beyond a reasonable doubt.'" *Morley* v. *Stenberg*, 828 F. Supp. 1413, 1422 (1993). All of these terms, however, are consistent with the interpretation of "substantial doubt" as a doubt "to a large degree." A jury could have a large and reasonable doubt about a defendant's guilt but still find the defendant guilty on "the strong probabilities of the case," believing it "likely" that the defendant committed the crime for which he was charged.

To be sure, the instruction does qualify the "strong probabilities" language by noting that "the strong probabilities of the case" should be "strong enough to exclude any doubt of his guilt that is reasonable." But this qualification is useless since a "doubt of his guilt that is reasonable" is immediately defined, in the very next sentence, as a "substantial doubt." Thus, the supposed clarification only compounds the confusion by referring the jury to the "substantial doubt" phrase as a means of defining the "strong probabilities" language.

Finally, the instruction issued in Victor's case states that a reasonable doubt "is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, *to a moral certainty*, of the guilt of the accused." In *Cage*, the Court disapproved of the use of the phrase "moral certainty," because of the real possibility that such language would lead jurors reasonably to believe that they could base their decision to convict upon moral standards or emotion in addition to or instead of evidentiary standards. The risk that jurors would understand "moral certainty" to authorize convictions based in part on value judgments regarding the defendant's behavior is particularly high in cases where the defendant is alleged to have committed a repugnant or brutal crime. In *Cage*, we therefore contrasted "moral certainty" with "evidentiary certainty," and held that where "moral certainty" is used in conjunction with "substantial doubt" and "grave uncertainty," the Due Process Clause is violated. 498 U. S., at 41.

Just as in *Cage*, the "moral certainty" phrase in Victor's instruction is particularly dangerous because it is used in conjunction with language that overstates the degree of doubt necessary to convict. This relationship between the "moral certainty" language, which potentially understates the degree of certainty required to convict, and the "substantial doubt," "strong probabilities," and "possibly you may be mistaken" language which, especially when taken together, overstates the degree of doubt necessary to acquit, also distinguishes Victor's instruction from the one challenged in No. 92–9049, *Sandoval* v. *California*. See *ante*, at 7. The jury instruction defining reasonable doubt in *Sandoval* used the phrases "moral certainty" and "moral evidence," but the phrases were not used in conjunction with language of the type at issue here—language that easily may be interpreted as overstating the degree of doubt required to acquit. In other words, in Victor's instruction, unlike Sandoval's, all of the misleading language is mutually reinforcing, both overstating the degree of doubt necessary to acquit and understating the degree of certainty required to convict.

This confusing and misleading state of affairs leads me ineluctably to the conclusion that, in Victor's case, there exists a reasonable likelihood that the jury believed that a lesser burden of proof rested with the prosecution; and, moreover, it prevents me from distinguishing the jury instruction challenged in Victor's case from the one issued in *Cage.* As with the *Cage* instruction, it simply cannot be said that Victor's instruction accurately informed the jury as to the degree of certainty required for conviction and the degree of doubt required for acquittal. Where, as here, a jury instruction attempts but fails to convey with clarity and accuracy the meaning of reasonable doubt, the reviewing court should reverse the conviction and remand for a new trial. See *Sullivan* v. *Louisiana,* 508 U. S., at 277–288. I would vacate the judgment of the Supreme Court of Nebraska and remand the case.

II

Although I concur in the Court's opinion in No. 92–9049, *Sandoval* v. *California,* I dissent from the Court's affirmance of the judgment in that case. Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994), I would vacate the sentence of death in *Sandoval.* And, in view of my dissent in *Callins,* I also would vacate the sentence of death in No. 92–8894, *Victor* v. *Nebraska,* even if I believed that the underlying conviction withstood constitutional scrutiny.

UNITED STATES *v.* GRANDERSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 92–1662. Argued January 10, 1994—Decided March 22, 1994

Respondent Granderson, a letter carrier, pleaded guilty to one count of destruction of mail. The potential imprisonment range for that crime was 0–6 months under the United States Sentencing Guidelines. The District Court imposed no prison time, sentencing Granderson instead to five years' probation and a fine. After Granderson tested positive for cocaine, the court resentenced him under 18 U. S. C. § 3565(a), which provides that if a person serving a sentence of probation possesses illegal drugs, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." Accepting the Government's reading of the statute, the District Court concluded that the phrase "original sentence" referred to the term of probation actually imposed (60 months), rather than the 0–6 month imprisonment range authorized by the Guidelines. Accordingly, that court resentenced Granderson to 20 months' imprisonment. The Court of Appeals upheld the revocation of Granderson's probation, but vacated his new sentence. Invoking the rule of lenity, the court agreed with Granderson that "original sentence" referred to the potential imprisonment range under the Guidelines, not to the actual probation sentence. Because Granderson had already served 11 months of his revocation sentence—more than the 6-months maximum under the Guidelines—the court ordered him released from custody.

Held: The minimum revocation sentence under § 3565(a)'s drug-possession proviso is one-third the maximum of the originally applicable Guidelines range of imprisonment, and the maximum revocation sentence is the Guidelines maximum. Pp. 44–57.

(a) The Government is correct that the proviso mandates imprisonment, not renewed probation, as the required type of punishment. The contrast in §§ 3565(a)(1) and (2) between "continu[ing]" and "revok[ing]" probation as the alternative punishments for a defendant who violates a probation condition suggests that a revocation sentence must be a sentence of imprisonment, not a continuation of probation. Moreover, it would be absurd to punish drug-possessing probationers by revoking their probation and imposing a new term of probation no longer than the original. However, the Government contends incorrectly that the term "original sentence" unambiguously calls for a sentence based on the term of probation. The statutory language appears to differentiate, not to equate or amalgamate, "the sentence of probation" and "the original sentence." The Government's interpretation, furthermore, reads the proviso's word "sentence" inconsistently. Pp. 44–47.

(b) Under Granderson's reading of the proviso, the "original sentence" that sets the duration of the revocation sentence is the applicable Guidelines sentence of imprisonment, not the revoked term of probation. That reading avoids both the linguistic anomalies presented by the Government's construction and the sentencing disparities that would attend the Government's interpretation. Furthermore, contrary to the Government's arguments, Granderson's reading satisfies the statute's purpose by treating the class of drug possessors more severely than other probation violators, and the proviso need not be interpreted *in pari materia* with the discrete, differently worded provision prescribing revocation of the supervised release of drug possessors. Moreover, the proviso's history furnishes additional cause to resist the Government's interpretation, for it indicates that the proviso may not have received Congress' careful attention and may have been composed with an obsolete federal sentencing regime in the drafters' minds. In these circumstances, where the text, structure, and statutory history fail to establish that the Government's position is unambiguously correct, the rule of lenity operates to resolve the statutory ambiguity in Granderson's favor. Pp. 47–54.

(c) The benchmark for the revocation sentence under the proviso is the maximum Guidelines sentence of imprisonment. Pp. 54–56.

(d) Because Granderson's maximum revocation sentence under the proviso was 6 months, and because he had already served 11 months imprisonment at the time the Court of Appeals issued its decision, that court correctly ordered his release. Pp. 56–57.

969 F. 2d 980, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, and SOUTER, JJ., joined. SCALIA, J., *post*, p. 57, and KENNEDY, J., *post*, p. 60, filed opinions concurring in the judgment. REHNQUIST, C. J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 69.

Thomas G. Hungar argued the cause for the United States. With him on the briefs were *Solicitor General Days, Acting Assistant Attorney General Keeney*, and *Deputy Solicitor General Bryson.*

Gregory S. Smith, by appointment of the Court, 510 U. S. 806, argued the cause for respondent. With him on the brief was *Stephanie Kearns.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case presents a question of statutory interpretation regarding revocation of a federal sentence of probation. The law at issue provides that if a person serving a sentence of probation possesses illegal drugs, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." 18 U. S. C. § 3565(a). Congress did not further define the critical term "original sentence," nor are those words, unmodified, used elsewhere in the Federal Criminal Code chapter on sentencing. Embedded in that context, the words "original sentence" in § 3565(a) are susceptible to at least three interpretations.

Read in isolation, the provision could be taken to mean the reimposition of a sentence of probation, for a period not less than one-third of the original sentence of probation. This construction, however, is implausible, and has been urged by neither party, for it would generally demand no increased sanction, plainly not what Congress intended.

The Government, petitioner here, reads the provision to draw the time period from the initially imposed sentence of probation, but to require incarceration, not renewed probation, for not less than one-third of that period. On the Government's reading, accepted by the District Court, respondent Granderson would face a 20-month mandatory minimum sentence of imprisonment.

Granderson maintains that "original sentence" refers to the sentence of incarceration he could have received initially, in lieu of the sentence of probation, under the United States Sentencing Guidelines. Granderson's construction calls for a 2-month mandatory minimum. The Court of Appeals accepted Granderson's interpretation, see 969 F. 2d 980 (CA11 1992); returns in other Circuits are divided.[1]

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*Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *R. William Ide III* and *Antonio B. Ianniello;* and for the National Association of Criminal Defense Lawyers by *Stephen R. Sady.*

The "original sentence" prescription of §3565(a) was a late-hour addition to the Anti-Drug Abuse Act of 1988, a sprawling enactment that takes up 364 pages in the Statutes at Large. Pub. L. 100–690, 102 Stat. 4181–4545. The provision appears not to have received Congress' careful attention. It may have been composed, we suggest below, with the pre-1984 federal sentencing regime in the drafters' minds; it does not easily adapt to the regime established by the Sentencing Reform Act of 1984.

According the statute a sensible construction, we recognize, in common with all courts that have grappled with the "original sentence" conundrum, that Congress prescribed imprisonment as the *type* of punishment for drug-possessing probationers.[2] As to the *duration* of that punishment, we rest on the principle that "'the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended.'" *Bifulco* v. *United States,* 447 U. S. 381, 387 (1980), quoting *Ladner* v. *United States,* 358 U. S. 169, 178 (1958). We therefore adopt Granderson's interpretation and affirm the judgment of the Court of Appeals.

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[1] Compare *United States* v. *Penn,* 17 F. 3d 70 (CA4 1994); *United States* v. *Alese,* 6 F. 3d 85 (CA2 1993) *(per curiam); United States* v. *Diaz,* 989 F. 2d 391 (CA10 1993); *United States* v. *Clay,* 982 F. 2d 959 (CA6 1993), cert. pending, No. 93–52; *United States* v. *Gordon,* 961 F. 2d 426 (CA3 1992) (all interpreting "original sentence" to mean the period of incarceration originally available under the United States Sentencing Guidelines), with *United States* v. *Sosa,* 997 F. 2d 1130 (CA5 1993); *United States* v. *Byrkett,* 961 F. 2d 1399 (CA8 1992); *United States* v. *Corpuz,* 953 F. 2d 526 (CA9 1992) (all reading "original sentence" to refer to the term of the revoked probation).

[2] The interpretation offered by JUSTICE KENNEDY—a reduced sentence of *probation* as the mandatory minimum—is notable for its originality. No court that has essayed construction of the prescription at issue has come upon the answer JUSTICE KENNEDY finds clear in "the text and structure of the statute." *Post,* at 60, 68. But cf. *post,* at 67 (describing the statute as "far from transparent").

I

Granderson, a letter carrier, pleaded guilty to one count of destruction of mail, in violation of 18 U. S. C. § 1703(a). Under the Sentencing Guidelines, the potential imprisonment range, derived from the character of the offense and the offender's criminal history category, was 0–6 months. The District Court imposed no prison time, but sentenced Granderson to five years' probation and a $2,000 fine.[3] As a standard condition of probation, Granderson was required to submit periodically to urinary testing for illegal drug use.

Several weeks after his original sentencing, Granderson tested positive for cocaine, and his probation officer petitioned for revocation of the sentence of probation. Finding that Granderson had possessed cocaine, the District Court revoked Granderson's sentence of probation and undertook to resentence him, pursuant to § 3565(a), to incarceration for "not less than one-third of the original sentence." The term "original sentence," the District Court concluded, referred to the term of probation actually imposed (60 months) rather than the imprisonment range authorized by the Guidelines (0–6 months). The court accordingly sentenced Granderson to 20 months' imprisonment.

The Court of Appeals upheld the revocation of the sentence of probation but vacated Granderson's new sentence. 969 F. 2d 980 (CA11 1992). That court observed that the probation revocation sentence of 20 months' imprisonment imposed by the District Court was far longer than the sentence that could have been imposed either for the underlying crime of destroying mail (six months) or for the crime of cocaine possession (one year). *Id.*, at 983, and n. 2. The Court of Appeals called it "legal alchemy" to convert an "original sentence" of "'conditional liberty,'" with a correspondingly long term, into a sentence of imprisonment with a time span geared to the lesser restraint. *Id.*, at 984, quoting *United States* v. *Gordon*, 961 F. 2d 426, 432 (CA3 1992). Invoking the rule of lenity, 969 F. 2d, at 983, the court concluded that the phrase "original sentence" referred to "the [0–6 month] sentence of incarceration faced by Granderson under the Guidelines," not to the 60-month sentence of probation, *id.*, at 984. Because Granderson had served 11 months of his revocation sentence—more than the 6-month maximum—the Court of Appeals ordered him released from custody. *Id.*, at 985.

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[3] The Sentencing Reform Act of 1984, for the first time, classified probation as a sentence; before 1984, probation had been considered an alternative to a sentence. See S. Rep. No. 98–225, p. 88 (1983).

II

The text of § 3565(a) reads:

> "If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . .
>
> "(1) continue him on probation, with or without extending the term or modifying [or] enlarging the conditions; or
>
> "(2) revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing.
>
> "*Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.*" (Emphasis added.)

The Government argues that the italicized proviso is unambiguous. The "original sentence" that establishes the benchmark for the revocation sentence, the Government asserts, can only be the very sentence actually imposed, *i. e.*, the sentence of probation. In this case, the sentence of probation was 60 months; "one-third of the original sentence" is thus 20 months. But for two reasons, the Government continues, Granderson's 20-month revocation sentence must be one of imprisonment rather than probation. First, the contrast in subsections (1) and (2) between "continu[ing]" and "revok[ing]" probation suggests that a revocation sentence must be a sentence of imprisonment, not a continuation of probation. Second, the Government urges, it would be absurd to "punish" drug-possessing probationers by revoking their probation and imposing a new term of probation no longer than the original. Congress could not be taken to have selected drug possessors, from the universe of all probation violators, for more favorable treatment, the Government reasons, particularly not under a provision enacted as part of a statute called "The Anti-Drug Abuse Act."

We agree, for the reasons stated by the Government, that a revocation sentence must be a term of imprisonment. Otherwise the proviso at issue would make little sense.[4] We do not agree, however, that the term "original sentence" relates to the duration of the sentence set for probation. The statute provides that if a probationer possesses drugs, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence." This language appears to differentiate, not to equate or amalgamate, "the sentence of probation" and "the original sentence." See *United States* v. *Penn*, 17 F. 3d 70, 73 (CA4 1994) ("a sentence of probation does not equate to a sentence of incarceration"). If Congress wished to convey the meaning pressed by the Government, it could easily have instructed that the defendant *be incarcerated* for a term "not less than one-third of the original sentence of probation," or "not less than one-third of the revoked term of probation."

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[4] JUSTICE KENNEDY's novel interpretation would authorize revocation sentences under which drug possessors could profit from their violations. The present case is an example. The District Court determined, just over 4 months into Granderson's 60-month sentence of probation, that Granderson had violated his conditions of probation by possessing drugs. If JUSTICE KENNEDY were correct that the proviso allows a revocation sentence of probation, one-third as long as the sentence of probation originally imposed, then the District Court could have "punished" Granderson for his cocaine possession by reducing his period of probation from 60 months to just over 24 months. JUSTICE KENNEDY's interpretation would present a similar anomaly whenever the drug-possessing probationer has served less than two-thirds of the sentence of probation initially imposed. Surely such an interpretation is implausible.

The Government's interpretation has a further textual difficulty. The Government reads the word "sentence," when used as a verb in the proviso's phrase "sentence the defendant," to mean "sentence to imprisonment" rather than "sentence to probation." Yet, when the word "sentence" next appears, this time as a noun ("original sentence"), the Government reads the word to mean "sentence of probation." Again, had Congress designed the language to capture the Government's construction, the proviso might have read: "[T]he court shall revoke the sentence of probation and sentence the defendant to *a term of imprisonment whose length is* not less than one-third *the length of* the original sentence *of probation.*" Cf. *Reves* v. *Ernst & Young*, 507 U. S. 170, 177 (1993) ("it seems reasonable to give . . . a similar construction" to a word used as both a noun and a verb in a single statutory sentence).

As the Court of Appeals commented, "[p]robation and imprisonment are not fungible"; they are sentences fundamentally different in character. 969 F. 2d, at 984. One-third of a 60-month term of *probation* or "conditional liberty" is a sentence scarcely resembling a 20-month sentence of *imprisonment.* The Government insists and, as already noted, we agree, that the revocation sentence, measured as one-third of the "original sentence," must be a sentence of imprisonment. But that "must be" suggests that "original sentence" refers the resentencer back to an anterior sentence of imprisonment, not a sentence of probation.

III

Granderson's reading of the § 3565(a) proviso entails such a reference back. The words "original sentence," he contends, refer back to § 3565(a)(2), the prescription immediately preceding the drug-possession proviso: the "other sentence that was available under subchapter A [the general sentencing provisions] at the time of the initial sentencing." The Guidelines sentence of imprisonment authorized by subchapter A was the "original sentence," Granderson argues, for it was the presumptive sentence, the punishment that probation, as a discretionary alternative, replaced. The Guidelines range of imprisonment available at Granderson's initial sentencing for destruction of mail was 0–6 months. Starting at the top of this range, Granderson arrives at two months as the minimum revocation sentence.

A

Granderson's interpretation avoids linguistic anomalies presented by the Government's construction. First, Granderson's reading differentiates, as does the proviso, between "the sentence of probation" that the resentencer must revoke and "the original sentence" that determines the duration of the revocation sentence. See *supra*, at 46. Second, Granderson's construction keeps constant the meaning of "sentence" in the phrases "sentence the defendant" and "original sentence." See *ibid.* While the Government cannot easily explain how multiplying a sentence *of probation* by one-third can yield a sentence *of imprisonment*, Granderson's construction encounters no such shoal. See *Gordon*, 961 F. 2d, at 433 ("one-third of three years probation is one year *probation*, not one year *imprisonment*").[5]

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[5] The dissent notes that the term "original sentence" has been used in a number of this Court's opinions and in other statutes and rules, in each instance to refer to a sentence actually imposed. See *post*, at 72–73, and

Granderson's reading of the proviso also avoids the startling disparities in sentencing that would attend the Government's interpretation. A 20-month minimum sentence would exceed not only the 6-month maximum punishment under the Guidelines for Granderson's original offense; it would also exceed the 1-year statutory maximum, see 21 U. S. C. § 844(a), that Granderson could have received, had the Government prosecuted him for cocaine possession and afforded him the full constitutional protections of a criminal trial, rather than the limited protections of a revocation hearing.[6] Indeed, a 20-month sentence would exceed consecutive sentences for destruction of mail and cocaine possession (18 months in all).

Furthermore, 20 months is only the *minimum* revocation sentence, on the Government's reading of the proviso. The Government's interpretation would have allowed the District Court to sentence Granderson to a term of imprisonment equal in length to the revoked term of probation. This prison term—five years—would be 10 times the exposure to imprisonment Granderson faced under the Guidelines for his

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nn. 4–5. None of those cases, statutes, or rules, however, involves an interpretive problem such as the one presented here, where, if the "original sentence" is the sentence actually imposed, a "plain meaning" interpretation of the proviso leads to an absurd result. See *supra,* at 41, 45, and n. 4.

The dissent observes, further, that other federal sentencing provisions "us[e] the word 'sentence' to refer to the punishment actually imposed on a defendant." *Post,* at 71, n. 2. In each of the cited instances, however, this reference is made clear by context, either by specifying the type of sentence (*e. g.,* "sentence to pay a fine," "sentence to probation," 18 U. S. C. § 3551(c)), or by using a variant of the phrase "impose sentence" (see §§ 3553(a), (b), (c), (e); 3554–3558).

[6] At a revocation hearing, in contrast to a full-scale criminal trial, the matter is tried to the court rather than a jury; also, the standard of proof has been held to be less stringent than the reasonable-doubt standard applicable to criminal prosecutions. See 18 U. S. C. § 3565(a); Fed. Rule Crim. Proc. 32.1; *United States* v. *Gordon,* 961 F. 2d 426, 429 (CA3 1992) (citing cases).

original offense, and 5 times the applicable statutory maximum for cocaine possession. It seems unlikely that Congress could have intended so to enlarge the District Court's discretion. See *Penn*, 17 F. 3d, at 73.[7]

B

Two of the Government's arguments against Granderson's interpretation are easily answered. First, the Government observes that the purpose of the Anti-Drug Abuse Act was to impose tough sanctions on drug abusers. See Brief for United States 22–26 (listing new penalties and quoting statements from Members of Congress that they intended to punish drug offenders severely). But we cannot divine from the legislators' many "get tough on drug offenders" statements any reliable guidance to particular provisions. None of the legislators' expressions, as the Government admits, focuses on "the precise meaning of the provision at issue in this case." *Id.*, at 24, and n. 4; cf. *Busic* v. *United States*, 446 U. S. 398, 408 (1980) ("[W]hile Congress had a general desire to deter firearm abuses, that desire was not unbounded. Our task here is to locate one of the boundaries, and the inquiry is not advanced by the assertion that Congress wanted no boundaries."). Under Granderson's interpretation, moreover, drug possessors are hardly favored. Instead, they are singled out among probation violators for particularly adverse treatment: They face mandatory, rather than optional, terms of imprisonment.

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[7] The dissent suggests that the statutory maximum for the original offense (five years in this case, see 18 U. S. C. § 1703(a)) is the maximum revocation sentence. See *post*, at 77, n. 8. The District Court, however, could not have imposed this sentence originally, without providing "the specific reason" for departing from the Guidelines range, 18 U. S. C. § 3553(c), and explaining in particular why "an aggravating . . . circumstance [exists,] of a kind, or to a degree, [that was] not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ." § 3553(b). Upward departures from the presumptive Guidelines range to the statutory maximum are thus appropriate only in exceptional cases. See *infra*, at 56, n. 14. The dissent's interpretation, however, would allow district courts to impose the statutory maximum as a revocation sentence in the routine exercise of their ordinary discretion.

Next, the Government argues that the drug-possession proviso must be construed *in pari materia* with the parallel provision, added at the same time, governing revocation of supervised release upon a finding of drug possession. In the latter provision, the Government observes, Congress ordered a revocation sentence of "not less than one-third of the term of supervised release," and it expressly provided that the revocation sentence should be "serve[d] in prison." 18 U. S. C. § 3583(g). Correspondingly, the Government maintains, the probation revocation proviso should be construed to require a minimum prison term of one-third the term of probation. The Government acknowledges that, while Congress spelled out "one-third of the term of supervised release," Congress did not similarly say "one-third of the term of probation." However, the Government attributes this difference to the fact that, unlike probation under the current sentencing regime, supervised release is not itself an "original sentence," it is only a component of a sentence that commences with imprisonment.

We are not persuaded that the supervised release revocation prescription should control construction of the probation revocation proviso. Supervised release, in contrast to probation, is not a punishment in lieu of incarceration. Persons serving postincarceration terms of supervised release generally are more serious offenders than are probationers. But terms of supervised release, because they follow up prison terms, are often shorter than initial sentences of probation.[8]

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[8] A probation term of 1–5 years is available for Class C and D felonies; the corresponding term of supervised release is not more than 3 years. For Class E felonies, a 1–5 year probation term is available, but not more than a 1-year term of supervised release. For misdemeanors, a probation term of not more than 5 years is available; the corresponding term of

Thus, under the Government's *in pari materia* approach, drug possessors whose original offense warranted the more serious sanction of prison plus supervised release would often receive shorter revocation sentences than would drug-possessing probationers.

The Government counters that Congress might have intended to punish probationers more severely because they were "extended special leniency." Reply Brief for United States 13, n. 14. A sentence of probation, however, even if "lenient," ordinarily reflects the judgment that the offense and offender's criminal history were not so serious as to warrant imprisonment. In sum, probation *sans* imprisonment and supervised release following imprisonment are sentences of unlike character. This fact weighs heavily against the argument that the discrete, differently worded probation and supervised release revocation provisions should be construed *in pari materia.*

C

The history of the probation revocation proviso's enactment gives us additional cause to resist the Government's interpretation. The Anti-Drug Abuse Act, in which the proviso was included, was a large and complex measure, described by one Member of the House of Representatives as "more like a telephone book than a piece of legislation." 134 Cong. Rec. 33290 (1988) (remarks of Rep. Conte). The proviso seems first to have appeared in roughly its present form as a Senate floor amendment offered after both the House and the Senate had passed the bill. See *id.*, at 24924–24925 (House passage, Sept. 22); *id.*, at 30826 (Senate passage, Oct. 14); *id.*, at 30945 (proviso included in lengthy set of amendments proposed by Sen. Nunn, Oct. 14). No conference report addresses the provision, nor are we aware of any post-

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supervised release is not more than 1 year. See 18 U. S. C. §§3561(b), 3583(b).

conference discussion of the issue.[9] The proviso thus seems to have been inserted into the Anti-Drug Abuse Act without close inspection. Cf. *United States* v. *Bass,* 404 U. S. 336, 344 (1971) (applying rule of lenity, noting that statutory provision "was a last-minute Senate amendment" to a long and complex bill and "was hastily passed, with little discussion, no hearings, and no report").

Another probation-related provision of the Anti-Drug Abuse Act, proposed shortly before the proviso, casts further doubt on the Government's reading. That provision amends the prohibition against using or carrying an explosive in the commission of a federal felony, to provide in part: "Notwithstanding any other provision of law, the court *shall not place on probation or suspend the sentence* of any person convicted of a violation of this subsection . . . ." Pub. L. 100–690, § 6474(b), 102 Stat. 4380, codified at 18 U. S. C. § 844(h) (emphasis added). This provision, notwithstanding its 1988 date of enactment, is intelligible only under pre-1984 law: The 1984 Sentencing Reform Act had abolished suspended sentences, and the phrase "place on probation" had yielded to the phrase "impose a sentence of probation."

Granderson's counsel suggested at oral argument, see Tr. of Oral Arg. 22–23, 29–31, 36–41, that the proviso's drafters might similarly have had in mind the pre-1984 sentencing regime, in particular, the pre-1984 practice of imposing a sentence of imprisonment, suspending its execution, and placing the defendant on probation. See 18 U. S. C. § 3651 (1982) (for any offense "not punishable by death or life imprisonment," the court may "suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best"). The proviso would fit the suspension-of-execution scheme precisely: The "original sentence" would be the sentence imposed but not executed, and one-third of that determinate sentence would be the revocation sentence. In that application, the proviso would avoid incongruities presented in Granderson's and the Government's interpretations of the words "original sentence": An imposed, albeit unexecuted, term of imprisonment would be an actual, rather than a merely available, sentence, and one-third of that sentence would be a term of imprisonment, not probation. If Granderson could demonstrate that the proviso's drafters in fact drew the prescription to match the pre-1984 suspension-of-execution scheme, Granderson's argument would be all the more potent: The closest post-1984 analogue to the suspended sentence is the Guidelines sentence of imprisonment that could have been implemented, but was held back in favor of a probation sentence.[10]

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[9] Debate over the conference bill took place in the middle of the night, see 134 Cong. Rec. 32633 (1988) ("I am cognizant that it is 2:20 in the morning, and I will not take long") (remarks of Sen. Dole); *id.*, at 33318 (House vote taken at 1 a.m.), with Congress anxious to adjourn and return home for the 1988 elections that were little more than two weeks away. Section-by-section analyses were produced after conference in both the Senate and the House, but neither publication casts much light on the proviso. See *id.*, at 32707 (Senate); *id.*, at 33236 (House).

We cannot say with assurance that the proviso's drafters chose the term "original sentence" with a view toward pre-1984 law.[11] The unexacting process by which the proviso was enacted, however, and the evident anachronism in another probation-related section of the Anti-Drug Abuse Act, leave us doubtful that it was Congress' design to punish drug-possessing probationers with the extraordinarily disproportionate severity the Government urges.

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[10] See Cunningham, Levi, Green, & Kaplan, Plain Meaning and Hard Cases, 103 Yale L. J. 1561, 1579–1581 (1994).

[11] The chief difficulty with such an interpretation is that pre-1984 law recognized two kinds of suspended sentences, each of which could lead to probation. While suspension of the *execution* of sentence, as mentioned, neatly fits Granderson's theory, suspension of the *imposition* of sentence fits the theory less well: In that situation, no determinate "original sentence" would be at hand for precise calculation of the revocation sentence.

In these circumstances—where text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in Granderson's favor. See, *e. g.*, *Bass*, 404 U. S., at 347–349. We decide that the "original sentence" that sets the duration of the revocation sentence is the applicable Guidelines sentence of imprisonment, not the revoked term of probation.[12]

IV

We turn, finally, to the Government's argument that Granderson's theory, and the Court of Appeals' analysis, are fatally flawed because the Guidelines specify not a term but a range—in this case, 0–6 months. Calculating the minimum revocation sentence as one-third of that range, the mandatory minimum term of imprisonment would be 0–2 months, the Government asserts, which would permit a perverse result: A resentencing court could revoke a drug possessor's sentence of probation, and then impose no sentence at all. Recognizing this curiosity, lower courts have used not 0–6 months as their starting place, but the top of that range, as the "original sentence," which yields 2 months as the minimum revocation sentence. The Government complains that no court has explained why the top, rather than the middle or the bottom of the range, is the appropriate point of reference.[13]

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[12] JUSTICE KENNEDY suggests that our interpretation of the proviso "read[s] a criminal statute against a criminal defendant," *post*, at 67, and that to the extent the rule of lenity is applicable, it would "deman[d] the interpretation" advanced in his opinion—that the proviso establishes a mandatory minimum sentence of probation, one-third as long as the sentence of probation initially imposed, *post*, at 69. We note that Granderson, the criminal defendant in this case, does not urge the interpretation JUSTICE KENNEDY presents. More to the point, both of JUSTICE KENNEDY's assertions presuppose that his interpretation of the proviso is a permissible one. For reasons set out above, we think it is not. See *supra*, at 45, and n. 4.

JUSTICE SCALIA suggests that on our interpretation of the proviso, the mandatory minimum revocation sentence should include a fine as well as a term of imprisonment. See *post*, at 58. The term of probation, however, was imposed in lieu of a sentence of imprisonment, not in lieu of a fine. Revocation of the sentence of probation, we think, implies replacing the sentence of probation with a sentence of imprisonment, but does not require changing an unrevoked sentence earlier imposed.

The reason for starting at the top of the range, however, is evident: No other solution yields as sensible a response to the "original sentence" conundrum. Four measures of the minimum revocation sentence could be hypothesized as possibilities, if the applicable Guidelines range is the starting point: The sentence could be calculated as (1) one-third of the Guidelines maximum, (2) one-third of the Guidelines minimum, (3) one-third of some point between the minimum and maximum, such as the midpoint, or (4) one-third of the range itself. The latter two possibilities can be quickly eliminated. Selecting a point between minimum and maximum, whether the midpoint or some other point, would be purely arbitrary. Calculating the minimum revocation sentence as one-third of the Guidelines range, in practical application, yields the same result as setting the minimum revocation sentence at one-third of the Guidelines minimum: To say, for example, that a 2–4 month sentence is the minimum revocation sentence is effectively to say that a 2-month sentence is the minimum.

Using the Guidelines minimum in cases such as the present one (0–6 month range), as already noted, would yield a minimum revocation sentence of zero, a result incompatible with the apparent objective of the proviso—to assure that those whose probation is revoked for drug possession serve a term of imprisonment. The maximum Guidelines sentence as the benchmark for the revocation sentence, on the other hand, is "a sensible construction" that avoids attributing to the legislature either "an unjust or an absurd conclusion." *In re Chapman*, 166 U. S. 661, 667 (1897).[14]

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[13] See *United States* v. *Penn,* 17 F. 3d 70 (CA4 1994) (expressly declaring that the minimum revocation sentence is one-third of the top of the Guidelines range); *United States* v. *Alese,* 6 F. 3d 85 (CA2 1993) *(per curiam)* (same); *United States* v. *Gordon,* 961 F. 2d 426 (CA3 1992) (same); *United States* v. *Clay,* 982 F. 2d 959 (CA6 1993) (holding that the maximum revocation sentence is the top of the Guidelines range), cert. pending, No. 93–52; *United States* v. *Diaz,* 989 F. 2d 391 (CA10 1993) (vacating a revocation sentence that exceeded the top of the original Guidelines range). The Court of Appeals in the present case was not required to identify the minimum term, because Granderson had served five months more than the top of the Guidelines range by the time the opinion was issued. See 969 F. 2d 980, 985 (CA11 1992).

V

We decide, in sum, that the drug-possession proviso of § 3565(a) establishes a mandatory minimum sentence of imprisonment, but we reject the Government's contention that the proviso unambiguously calls for a sentence based on the term of probation rather than the originally applicable Guidelines range of imprisonment. Granderson's interpretation, if not flawless, is a securely plausible reading of the statutory language, and it avoids the textual difficulties and sentencing disparities we identified in the Government's position. In these circumstances, in common with the Court of Appeals, we apply the rule of lenity and resolve the ambiguity in Granderson's favor. The minimum revocation sentence, we hold, is one-third the maximum of the originally applicable Guidelines range,[15] and the maximum revocation sentence is the Guidelines maximum.

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[14] The Government observes that "in appropriate circumstances" the sentencing court may depart upward from the presumptive Guidelines range, limited in principle only by the statutory maximum. See 18 U. S. C. § 3553(b). According to the Government, it follows that if the "original sentence" is the "maximum available sentence," then the statutory maximum rather than the top of the presumptive Guidelines range is the appropriate basis for the revocation sentence. Brief for United States 22. The short answer to the Government's argument is that for cases in which the sentencing judge considers an upward departure warranted, a sentence of probation, rather than one of imprisonment, is a most unlikely prospect. It makes scant sense, then, to assume that an "original sentence" for purposes of probation revocation is a sentence beyond the presumptively applicable Guidelines range.

In this case, the maximum revocation sentence is six months. Because Granderson had served 11 months imprisonment by the time the Court of Appeals issued its decision, that court correctly ordered his release. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE SCALIA, concurring in the judgment.

My view of this case is close to, but not precisely, that of JUSTICE KENNEDY. I agree with him, for the reasons he well expresses, that the only linguistically tenable interpretation of 18 U. S. C. § 3565(a) establishes as a *floor* a sentence one-third of the sentence originally imposed, but leaves the district court free to impose any *greater* sentence available for the offense under the United States Code and the Sentencing Guidelines. Wherein I differ is that I do not believe (as he does) that only the probation element of the original sentence is to be considered—*i. e.*, as he puts it, "that 'original sentence' refers to the sentence *of probation* a defendant in fact received at the initial sentencing." *Post*, at 61 (emphasis added). (THE CHIEF JUSTICE also espouses this view, see *post,* at 71.) It seems to me that the term must refer to the *entire* original sentence; where that includes a fine in addition to the probation, the fine also is included. Thus, one-third of a sentence consisting of three years' probation and a $3,000 fine would be not merely one year's probation but a $1,000 fine as well. Even the majority, to maintain some measure of consistency in its strained interpretation of "original sentence," ought to consider, in addition to "the applicable Guidelines sentence of imprisonment," *ante,* at 54, the equally applicable range of fines set forth in the Guidelines, see United States Sentencing Commission, Guidelines Manual § 5E1.2(c)(3) (Nov. 1993) (USSG).*

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[15] At oral argument the Government suggested that its own interpretation is more lenient than Granderson's, in those rare cases in which the court has departed downward from the Guidelines to impose a sentence of probation. In *United States* v. *Harrison*, 815 F. Supp. 494 (DC 1993), for example, the court, on the Government's motion, had departed downward from a 97–121 month Guidelines range and a 10-year statutory mandatory minimum to impose only a sentence of probation. When the Government moved to revoke probation for drug possession, the court held that the statute required basing the revocation sentence upon the term of probation rather than the Guidelines range, and, in the alternative, that even if the statute were ambiguous, the rule of lenity would so require. Having found § 3565(a)'s drug-possession proviso ambiguous, we agree that the rule of lenity would support a shorter sentence, whether on *Harrison*'s analysis, or on the theory that the "applicable Guidelines range" is the maximum of a Guidelines range permitting a sentence of probation.

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*The Court's reply to this is that since "[t]he term of probation . . . was imposed in lieu of a sentence of imprisonment, not in lieu of a fine," its revocation "implies replacing the sentence of probation with a sentence of imprisonment." *Ante,* at 54, n. 12. I do not know why an implication would inhere in the proviso which contradicts the body of § 3565(a)(2) to which the proviso is attached. The latter provides that the court may "revoke the sentence of probation and impose *any other sentence that was available* . . . at the time of the initial sentencing" (emphasis added). Presumably the Court would concede that "any other sentence" includes a fine—in which case its discernment of some implication that revoked probation may be replaced by only prison time must be wrong.

JUSTICE KENNEDY makes a similar defense. He refuses to consider the fine component because "[t]he proviso instructs the district court to 'revoke the sentence of probation,' but says nothing about the fine imposed at the initial sentencing," *post,* at 61. There is, however, clearly no requirement that only what has been revoked can be the baseline for measuring the requisite minimum—for even the *un*revoked (because already served) portion of the probation period counts. JUSTICE KENNEDY's argument reduces, therefore, to the contention that for some unexplained reason the requisite minimum replacement for the revoked "probation component" of the original sentence can be measured only by that same component. This imperative is not to be found in the language of the statute; to the contrary, interchangeability of fines and probation is suggested by the body of § 3565(a)(2) quoted above. Here, it seems to me, JUSTICE KENNEDY simply abandons the text and adopts an intuited limitation remarkably similar to those for which he criticizes the Court and the dissent.

Both under my analysis, and under JUSTICE KENNEDY's, there exists a problem of comparing the incomparable that ought to be acknowledged. Since Granderson's original sentence was 60 months' probation *plus a $2,000 fine,* I must, in order to concur in today's judgment, conclude, as I do, that the five extra months of prison (beyond the Guidelines' 6-month maximum imposable for the original offense) which Granderson has served are worth at least $667 (one-third the original fine) and that 11 months in prison are the equivalent of 20 months' probation plus a $667 fine—because otherwise I would have to consider imposing some or all of the $5,000 maximum fine imposable for the original offense, see USSG § 5E1.2(c)(3), or indeed consider departing upward from the applicable Guidelines range, see 18 U. S. C. § 3553(b), towards the 5-year imprisonment that is the statutory maximum for the offense, see 18 U. S. C. § 1703(a). And JUSTICE KENNEDY, even if he takes only the probation into account for purposes of determining the "original sentence," must *still* conclude, it seems to me, that 11 months in prison is at least the equivalent of 20 months' probation—because otherwise he would have to consider imposing some or all of the available $5,000 fine or departing upward from the Guidelines.

It is no easy task to determine how many days' imprisonment equals how many dollars' fine equals how many months' probation. Comparing the incommensurate is always a tricky business. See, *e. g., Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.,* 486 U. S. 888, 897 (1988) (SCALIA, J., concurring in judgment). I frankly doubt that those who drafted and adopted this language intended to impose that task upon us; but I can neither pronounce the results reached by a straightforward reading of the statute utterly absurd nor discern any other self-evident disposition for which they are an obviously mistaken replacement. Cf. *Green* v. *Bock Laundry Machine Co.,* 490 U. S. 504, 527 (1989) (SCALIA, J., concurring in judgment). It seems to me that the other interpretations proposed today suffer, in varying degrees, the double curse of producing *neither* textually faithful results *nor* plausibly intended ones. It is best, as usual, to apply the statute as written, and to let Congress make the needed repairs. That repairs are needed is perhaps the only thing about this wretchedly drafted statute that we can all agree upon.

For these reasons, I concur in the judgment of the Court.

JUSTICE KENNEDY, concurring in the judgment.

The Court's holding that the drug proviso in 18 U. S. C. § 3565(a) calls for a mandatory minimum sentence of two months in prison rests upon two premises: first, that the term "original sentence" means the maximum Guidelines sentence that the district court could have, but did not, impose at the initial sentencing; and, second, that the verb "sentence" means only "sentence to imprisonment." Neither premise is correct. As close analysis of the text and structure of the statute demonstrates, the proviso requires a mandatory minimum sentence of a probation term one-third the length of the initial term of probation. I concur in the judgment only because Granderson, under my reading of the statute, was entitled to release from prison.

I

Section 3565(a) provides, in relevant part:

> "If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may . . .
>
> "(1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
>
> "(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A at the time of the initial sentencing.
>
> "Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession

> of a controlled substance, thereby violating the condition imposed by section 3563(a)(3), the court shall revoke the sentence of probation and *sentence* the defendant to not less than one-third of the *original sentence.*" (Emphasis added.)

The Court construes the term "original sentence" to refer to the maximum sentence of imprisonment available under the Guidelines at the initial sentencing. I accept, in substantial part, THE CHIEF JUSTICE's critique of the Court's strained interpretation, and agree with him that "original sentence" refers to the sentence of probation a defendant in fact received at the initial sentencing. It is true that the term "original sentence," standing alone, could be read to encompass the entire original sentence, including any fine imposed. When considered in context, however, it is preferable to construe the term to refer only to the original sentence of probation. The proviso instructs the district court to "revoke the sentence of probation," but says nothing about the fine imposed at the initial sentencing. Given this, the subsequent reference to "one-third of the original sentence" is better read to mean the probation component of the original sentence, and not the whole sentence.

I disagree with both the Court and THE CHIEF JUSTICE, however, in their conclusion that the verb "sentence" in the proviso means only "sentence to imprisonment." Given the statutory text and structure, the verb "sentence" can mean either "sentence to probation" or "sentence to imprisonment." It follows, in my view, that the drug proviso calls for a mandatory minimum sentence equal to a probation term one-third the length of the original term of probation.

Before 1984, fines and imprisonment were the only sentences in the federal system; probation, by contrast, was an alternative to sentencing. See 18 U. S. C. § 3651 (1982). In the Sentencing Reform Act of 1984, Congress altered this understanding and made probation a kind of sentence. See § 3561(a) (defendant "may be sentenced to a term of probation"); United States Sentencing Commission, Guidelines Manual ch. 7, pt. A2(a), p. 321 (Nov. 1993) (USSG) ("[T]he Sentencing Reform Act recognized probation as a sentence in itself"). Probation no longer entails some deviation from a presumptive sentence of imprisonment, as the facts of this case illustrate. Granderson's conviction for destruction of mail, when considered in light of his criminal history category, placed him in Zone A of the Guidelines Sentencing Table, which carries a presumptive sentence of 0 to 6 months. The Sentencing Guidelines authorize a sentence of probation for defendants falling within Zone A, see USSG § 5B1.1(a)(1), and set a maximum probation term of five years for the subset of Zone A defendants of which Granderson is a member, see § 5B1.2(a)(1). For defendants like Granderson, then, probation is a sentence available at the initial sentencing, no less so than a sentence of imprisonment. See 18 U. S. C. § 3553(a)(4) (the court, in determining sentence, "shall consider . . . the *kinds of sentence* and the sentencing range established for the applicable category of offense . . . as set forth in the guidelines") (emphasis added). Because the term "to sentence," if left unadorned, can bear any one of three meanings, Congress took care, as a general matter, to specify the type of punishment called for when it used "sentence" as a verb in Chapter 227 of Title 18, the sentencing provisions of the criminal code. See, *e. g.*, § 3561(a) ("sentenced to a term of probation"), § 3572(e) ("sentenced to pay a fine"), § 3583(a) ("impos[e] a sentence to a term of imprisonment").

Congress was less careful when drafting the provision now before us, which does not specify whether the district court should impose a fine, imprisonment, or another term of probation when revoking the original term of probation on account of drug possession. The Government brushes aside this significant ambiguity, contending that "the language of the statute, in context," demonstrates that Congress "plainly intended" to require imprisonment. Brief for United States

14, 15. The Government is correct to say that we must examine the context of the proviso to ascertain its meaning. See *Davis* v. *Michigan Dept. of Treasury,* 489 U. S. 803, 809 (1989). Close attention to that context, however, leads me to conclude that Congress did not intend to require imprisonment upon revocation of the original term of probation.

Congress enacted the drug proviso as § 7303(a)(2) of the Anti-Drug Abuse Act of 1988 (1988 Act). Pub. L. 100–690, 102 Stat. 4181, 4464. Section 7303(b)(2) of the 1988 Act, which concerns defendants serving a term of supervised release, provides that "[i]f the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant *to serve in prison* not less than one-third of the term of supervised release." 102 Stat. 4464, codified at 18 U. S. C. § 3583(g) (emphasis added).

Sections 7303(a)(2) and (b)(2) are, as the Government puts it, "parallel and closely related." Brief for United States 26. Both pertain to the consequences of drug possession for defendants under some form of noncustodial supervision. They differ, of course, in one fundamental respect: Section 7303(b)(2) explicitly provides for a revocation sentence of imprisonment, while § 7303(a)(2) does not. The difference is significant. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Gozlon-Peretz* v. *United States,* 498 U. S. 395, 404 (1991), quoting *Russello* v. *United States,* 464 U. S. 16, 23 (1983) (internal quotation marks omitted). The presumption loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment. But in this case, given the parallel structure of §§ 7303(a)(2) and (b)(2) and the fact that Congress enacted both provisions in the same section of the same Act, the presumption is strong. The disparate use of the term "to serve in prison" is compelling evidence that Congress intended to mandate incarceration as a revocation punishment in § 7303(b)(2), but not in § 7303(a)(2) (the § 3565(a) drug proviso).

The Government interposes a structural argument of its own. Before enactment of the drug proviso in the 1988 Act, § 3565(a) consisted only of subsections (a)(1) and (a)(2), which, for all relevant purposes, took the same form as they do now. Those provisions grant courts two options for defendants who violate probation conditions that do not involve drugs or guns. Section 3565(a)(1) permits a court to continue the defendant on probation, with or without extending the term or modifying or enlarging the conditions. As an alternative, § 3565(a)(2) permits a court to "revoke the sentence of probation and impose any other sentence that was available . . . at the time of the initial sentencing." According to the Government, the two provisions make clear that the consequence of revocation under § 3565(a)(2) is that, in light of § 3565(a)(1), the court must impose a sentence other than probation, namely imprisonment. The meaning borne by the phrase "revoke the sentence of probation" in § 3565(a)(2), the Government concludes, must carry over when the same phrase appears in the drug proviso.

This argument, which the Court accepts, see *ante,* at 45, is not convincing. The conclusion that § 3565(a)(2) demands imprisonment upon revocation of the original sentence of probation does not rest upon anything inherent in the phrase "revoke the sentence of probation." Rather, it follows from the structure of §§ 3565(a)(1) and (a)(2). Congress set off subsection (a)(2) as an alternative to subsection (a)(1), which provides for every conceivable probation option. Thus, in order to make sense of the statutory scheme, § 3565(a)(2) should be read to require a punishment of something other than probation: imprisonment. That consequence, however, is due to the juxtaposition of subsection (a)(2) with subsection (a)(1), not to Congress' use of the phrase "revoke the sentence of probation" in § 3565(a)(2). Taken by itself, that phrase requires termination of the original sentence of probation, but does not indicate the kind of sentence that must be imposed in its place. The meaning assumed by the phrase "revoke the sentence of probation" in the particular context of § 3565(a)(2), then, does not travel when the same phrase appears in a different context.

The Government's argument that "revoke the sentence of probation," standing alone, must import a sentence of imprisonment also fails to account for how similar language is used in § 7303(b)(2) of the 1988 Act. That provision, as noted above, states that "the court shall terminate the term of supervised release and require the defendant to *serve in prison* not less than one-third of the term of supervised release" if a defendant is found in possession of drugs. 18 U. S. C. § 3583(g) (emphasis added). The statutory text suggests that a subsequent sentence of imprisonment is not implicit in the phrase "the court shall terminate the term of supervised release"; had it been, Congress would not have felt it necessary to mandate imprisonment in an explicit manner. So there is little reason to think that Congress believed imprisonment to be implicit in the parallel phrase "the court shall revoke the sentence of probation" in the § 3565(a) drug proviso, § 7303(a)(2) of the 1988 Act.

The Government's view suffers from a final infirmity. The term "original sentence" refers to the sentence of probation imposed at the initial sentencing. So if the proviso imposed a minimum punishment of incarceration, the length of incarceration must be tied to the length of the revoked sentence of probation. That would be an odd result. " '[I]mprisonment is an 'intrinsically different' form of punishment' " than probation. *Blanton* v. *North Las Vegas*, 489 U. S. 538, 542 (1989), quoting *Muniz* v. *Hoffman*, 422 U. S. 454, 477 (1975). Without belaboring the point, probation is a form of "conditional liberty," *Black* v. *Romano*, 471 U. S. 606, 611 (1985), while imprisonment is nothing of the sort. Transforming a sentence of probation into a prison term via some mathematical formula would, in the words of one court to have considered this issue, constitute a form of "legal alchemy." *United States* v. *Gordon*, 961 F. 2d 426, 433 (CA3 1992). In all events, it is not what one would expect in the ordinary course.

THE CHIEF JUSTICE is correct, of course, to say that it would not be irrational for Congress to tie a mandatory minimum sentence of imprisonment to the length of the original probation term. *Post*, at 75. He is also correct to observe that Congress would have been within its powers to write such a result into law, and that Congress indeed provided for a similar result in § 7303(b)(2) of the 1988 Act, 18 U. S. C. § 3583(g). *Post*, at 76. But these observations do not speak to the only relevant question: whether Congress did so in the text of the § 3565(a) drug proviso, viewed in light of the statutory structure. For all of the above reasons, in my view it did not.

In sum, the drug proviso does not mandate incarceration, but rather must be read to permit a revocation sentence of probation. Concluding that the mandatory minimum sentence is a term of imprisonment would be inconsistent with this reading, and would also lead to the anomaly of tying the length of the mandated prison term to the original term of probation. It follows that the mandatory minimum sentence required by the drug proviso is a probation term equal to one-third the length of the original term of probation. Given that Congress did not eliminate the possibility of incarceration (for example, by drafting the proviso to require a "sentence of probation"), the proviso gives the district court the discretion to impose any prison term otherwise available under the other portions of § 3565(a), which is more severe than the mandatory minimum sentence of probation.

II

It is unfortunate that Congress has drafted a criminal statute that is far from transparent; more unfortunate that the Court has interpreted it to require imprisonment when the text and structure call for a different result; but most unfortunate that the Court has chosen such a questionable path to reach its destination. I speak of the Court's speculation that Congress drafted the § 3565(a) drug proviso with the pre-1984 federal sentencing regime in mind. See *ante*, at 52–53. Reading the proviso to require Granderson to serve a 2-month mandatory minimum sentence of imprisonment, the Court reasons, "would fit the [pre-1984] scheme precisely." *Ante*, at 53. And viewing the proviso in that light, the Court adds, would avoid problems with both Granderson's and the Government's interpretations. See *ibid.* Although the Court purports not to place much reliance upon this venture in interpretive archaeology, its extended discussion of the matter suggests otherwise.

This interpretive technique, were it to take hold, would be quite a novel addition to the traditional rules that govern our interpretation of criminal statutes. Some Members of the Court believe that courts may look to "the language and structure, legislative history, and motivating policies" when reading a criminal statute in a manner adverse to a criminal defendant. See *United States* v. *R. L. C.*, 503 U. S. 291, 305 (1992) (plurality opinion) (internal quotation marks omitted). Others would eschew reliance upon legislative history and nebulous motivating policies when construing criminal statutes. See *id.*, at 308–310 (SCALIA, J., concurring). But, to my knowledge, none of us has ever relied upon some vague intuition of what Congress "might . . . have had in mind" (*ante*, at 52) when drafting a criminal law. And I am certain that we have not read a criminal statute against a criminal defendant by attributing to Congress a mindset that reflects a statutory framework that Congress itself had discarded over four years earlier.

Of course, the Court thinks it has done Granderson and probationers like him a great favor with its guesswork: Assuming that the drug proviso mandates incarceration, the Court's intuitions lead it to conclude that the mandatory minimum sentence of imprisonment here is 2, rather than 20, months. But in its rush to achieve what it views as justice in this case, the Court has missed a broader point: The statute, by word and design, does not mandate a punishment of imprisonment on revocation. In my respectful submission, had the Court adhered to the text and structure of the statute Congress enacted and the President signed, rather than given effect to its own intuitions of what might have been on Congress' mind at the time, it would have come to a different conclusion. See *Deal* v. *United States,* 508 U. S. 129, 136–137 (1993). And the fortuity that Granderson himself does not contend that the proviso permits a revocation sentence of probation, see *ante,* at 54, n. 12, is no reason to overlook that option here, given that our interpretation of the statute binds all probationers, not just Granderson. Cf. *Elder* v. *Holloway,* 510 U. S. 510, 514–516, and n. 3 (1994).

Perhaps the result the Court reaches today may be sensible as a matter of policy, and may even reflect what some in Congress hoped to accomplish. That result, however, does not accord with the text of the statute Congress saw fit to enact. Put in simple terms, if indeed Congress intended to require the mandatory minimum sentence of imprisonment the Court surmises, Congress fired a blank. See *Puerto Rico Dept. of Consumer Affairs* v. *ISLA Petroleum Corp.,* 485 U. S. 495, 501 (1988) ("[U]nenacted approvals, beliefs, and desires are not laws"). It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result. See *Smith* v. *United States,* 508 U. S. 223, 247, n. 4 (1993) (SCALIA, J., dissenting) ("Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in"); *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Industries Corp.*, 493 U. S. 120, 126 (1989) ("Our task is to apply the text, not to improve upon it"); *United States* v. *Locke*, 471 U. S. 84, 95 (1985) ("[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do"). This admonition takes on a particular importance when the Court construes criminal laws. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity," *United States* v. *Bass*, 404 U. S. 336, 348 (1971), and set the punishments therefor, see *Bifulco* v. *United States*, 447 U. S. 381 (1980).

Under any of the three interpretations set forth in the opinions filed today, there are bound to be cases where the mandatory sentence will make little sense or appear anomalous when compared with sentences imposed in similar cases. Some incongruities, however, are inherent in any statute providing for mandatory minimum sentences.

In my view, it is not necessary to invoke the rule of lenity here, for the text and structure of the statute yield but one proper answer. But assuming, as the Court does, that the rule comes into play, I would have thought that it demands the interpretation set forth above. For these reasons, I concur only in the judgment.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, dissenting.

The Court today interprets the term "original sentence," as it appears in 18 U. S. C. § 3565(a), to mean "the maximum sentence, under the relevant Sentencing Guidelines range, which a defendant could have received, but did not, when initially sentenced." I think this interpretation ignores the most natural meaning of these two words, and I therefore dissent.

Section 3565(a) does not indicate on its face whether a defendant found in violation of probation must be sentenced to prison or resentenced to another term of probation. I agree with the Court that § 3565(a) must be read to require imposition of a term of imprisonment; otherwise, as the Court explains, the proviso would be senseless.[1] See *ante*, at 45; *In re Chapman*, 166 U. S. 661, 667 (1897) ("[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion"). If the Court had stopped there, I would have been happy to join its opinion. Having correctly resolved one ambiguity in § 3565(a), however, the Court proceeds to find another, regarding the meaning of the term "original sentence," where none exists. The Court thus ultimately concludes, incorrectly in my view, that the rule of lenity should be applied.

The Court believes that the Government's reading of § 3565(a) is not "unambiguously correct." *Ante*, at 54. As we have explained, however, the rule of lenity should not be applied "merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government." *Moskal* v. *United States*, 498 U. S. 103, 108 (1990). Instead we have reserved lenity for those situations where, after "[a]pplying well-established principles of statutory construction," *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 410 (1991), there still remains "a grievous ambiguity or uncertainty in the language and structure of the Act," *Chapman* v. *United States,* 500 U. S. 453, 463 (1991) (internal quotation marks and citation omitted).

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[1] The option of imposing a fine after revocation is also foreclosed. As a matter of common usage, the prepositional phrase following a noun need not be repeated when the noun appears again in the same sentence. Thus, § 3565(a) reads: "[T]he court shall revoke the sentence *of probation* and sentence the defendant to not less than one-third of the original sentence *[of probation]*." (Emphasis added.) "[N]ot less than one-third" of a term of probation is a period of time. A fine cannot follow revocation, then, because a fine is measured in money, not time.

The term "original sentence" is not defined in the statute. A basic principle of statutory construction provides that where words in a statute are not defined, they "must be given their ordinary meaning." *Id.,* at 462; see also *Smith* v. *United States,* 508 U. S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning").

Whether one consults a dictionary or common sense, the meaning of "original sentence" is plain: The term refers to the initial judgment imposing punishment on a defendant. "Original" is commonly understood to mean "initial" or "first in order." See Webster's Third New International Dictionary 1592 (1971) (Webster's) (defining "original" as "of or relating to a rise or beginning . . . initial, primary"); Black's Law Dictionary 1099 (6th ed. 1990) (defining "original" as "[p]rimitive" or "first in order"). "Sentence," in turn, is ordinarily meant in the context of criminal law to refer to the judgment or order "by which a court or judge imposes punishment or penalty upon a person found guilty." Webster's 2068; see also Black's Law Dictionary, *supra,* at 1362 (defining "sentence" as "[t]he judgment . . . imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation").[2] In the context of § 3565(a), the term "original sentence" thus must refer to the sentence of probation a defendant actually received when initially sentenced. It *cannot,* therefore, mean what the Court says it means: the maximum sentence which a defendant could have received, but did not.

The Court's interpretation thus founders, I believe, because the word "sentence" does not ordinarily, or even occasionally, refer to a *range* of available punishment. Nor does the modifying word "original" support the Court's interpretation, because "original" is nowhere defined as "potential" or "available," nor can it be so construed. Yet under the Court's interpretation of the term "original sentence," if we know that "sentence" itself does not mean an available range of punishment, then "original" must be twisted to mean what we know it cannot—*i. e.*, "potential" or "available."[3]

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[2] Federal sentencing law also consistently uses the word "sentence" to refer to the punishment actually imposed on a defendant. See, *e. g.,* 18 U. S. C. §§ 3551(b) and (c), 3553(a), (b), (c), and (e), and 3554–3558.

This Court has on many occasions demonstrated its clear understanding of the term "original sentence." See, *e. g.*, *Hicks* v. *Feiock*, 485 U. S. 624, 639, and n. 11 (1988) (using term "original sentence" to refer to sentence of imprisonment initially imposed and suspended); *Tuten* v. *United States*, 460 U. S. 660, 666–667, and n. 11 (1983) (using term "original sentence" to refer to period of probation imposed by sentencing court when youthful defendant was initially sentenced); *United States* v. *DiFrancesco*, 449 U. S. 117, 135 (1980), and *id.*, at 148 (Brennan, J., dissenting) (both using term "original sentence" to refer to sentence imposed upon defendant at conclusion of first trial); *North Carolina* v. *Pearce*, 395 U. S. 711, 713, and n. 1 (1969), and *id.*, at 743 (Black, J., concurring in part and dissenting in part) (same); *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 53 (1937)

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[3] Congress itself, in the subsections preceding and following the provision at issue here, distinguishes between "original" and "available." Sections 3565(a)(2) and (b) provide that under certain circumstances, a court can or must "revoke the sentence of probation and impose any other sentence that was *available* . . . at the time of the initial sentencing." (Emphasis added.) If "original" and "available" were in fact synonymous, or if "sentence" could mean an available range of punishment, Congress could have simply stated in §§ 3565(a)(2) and (b) that upon revocation of probation, a court can or must "impose the original sentence." See *United States* v. *Sosa*, 997 F. 2d 1130, 1133 (CA5 1993) ("The statute taken as a whole demonstrates that Congress knew how to refer to the sentence the defendant could have received at the time of the initial sentencing. Instead, . . . Congress used the term 'original sentence,' which plainly refers to the sentence imposed on the defendant for his original crime").

(same). As these and numerous other opinions show,[4] we have until today invariably used "original sentence" just as one would expect: to refer to the punishment imposed upon a defendant when he was first sentenced, and to distinguish that initial sentence from a sentence the defendant received after some intervening event—such as a new trial, see *Pearce, supra,* or a revocation of probation, see *Hicks, supra.*[5]

The Court's heretofore firm grasp on the meaning of "original sentence" should not be cause for wonder or surprise. Whether alone or in combination, the definitions of "original" and "sentence" simply do not seem open to serious debate. Once the term "original sentence" is accorded its ordinary meaning, the operation of § 3565(a) becomes perfectly clear.[6]

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[4] The term "original sentence" appears in at least 50 prior opinions. Rather than citing them all, suffice it to say that a review of these opinions reveals that the term is not once used to refer to the range of punishment potentially applicable when a defendant was first sentenced.

[5] Although the term "original sentence" does not appear in other provisions of the Federal Criminal Code chapter on sentencing, it does appear in other federal statutes and rules. In each instance, the term refers to the sentence initially imposed upon a defendant. See, *e. g.,* Fed. Rule Crim. Proc. 35(a)(2) (directing sentencing courts to correct sentences upon remand from a court of appeals if, after further sentencing proceedings, "the court determines that the original sentence was incorrect"); 10 U. S. C. § 863 (providing that upon rehearing in a court-martial, "no sentence in excess of or more severe than the original sentence may be imposed"). The term is similarly used in the Federal Sentencing Guidelines. See, *e. g.,* United States Sentencing Commission, Guidelines Manual § 4A1.2(k) (Nov. 1993) (using term "original sentence" to refer to sentence previously imposed upon defendant); § 7B1.4, comment., n. 4 (same).

[6] The Court suggests that if "original sentence" is given its ordinary meaning, the statute will have to be interpreted to require the absurd result that a revocation sentence be another term of probation. See *ante,* at 47–48, n. 5. I do not see at all how or why the latter proposition follows from the former. The Court rightly rejects interpreting the statute to require reimposition of probation because that would be a senseless reading, and it would be senseless regardless of what the term "original sentence" means. See *ante,* at 44–45. It is thus beyond me why the Court

It follows, from another elementary canon of construction, that the plain language of § 3565(a) should control. See *Moskal,* 498 U. S., at 108. As we stated in *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 108 (1980), "[a]bsent a clearly expressed legislative intention to the contrary, [the statutory] language must ordinarily be regarded as conclusive."[7]

The Court offers several reasons for rejecting the most natural reading of § 3565(a). None of them persuades. The Court begins by suggesting that if Congress meant for the sentence of probation to be used to calculate the length of incarceration, it could have stated so more clearly. See *ante,* at 46. Although perhaps true, Congress could have just as easily, if it wished, stated in clear terms that the sentence of incarceration should be calculated based on the maximum available sentence under the Guidelines range. Indeed, as I have already noted, *supra,* at 72, n. 3, Congress stated something very similar in the subsections preceding and following the one at issue, where it provided that upon revocation of probation, a court can or must impose any sentence that was "available" when the defendant was initially sentenced. See §§ 3565(a)(2) and (b); *United States* v. *Sosa,* 997 F. 2d 1130, 1133 (CA5 1993); *United States* v. *Byrkett,* 961 F. 2d 1399, 1400–1401 (CA8 1992) ("If Congress, in referring to the 'original sentence,' meant the Guidelines range

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seems to think that according the term "original sentence" its most natural reading would require it to readopt a reading of the statute that it justifiably discarded as senseless.

[7] The Court suggests that the legislative history of § 3565(a) casts doubt upon the Government's interpretation. Yet even the Court recognizes that the legislative history is, at best, inconclusive. See *ante,* at 49 ("None of the legislators' expressions . . . focuses on 'the precise meaning of the provision at issue in this case'") (quoting Brief for United States 24, and n. 4); see also *ante,* at 51–53, and n. 11. Where the language of a statute is clear, that language, rather than "isolated excerpts from the legislative history," should be followed. *Patterson* v. *Shumate,* 504 U. S. 753, 761, and n. 4 (1992).

applicable at the time of the initial sentencing, it would have simply said, 'any other sentence that was available . . . at the time of the initial sentencing,' as it did" in §§ 3565(a)(2) and (b)).

The Court also asserts that its reading of the term avoids according two different meanings to the word "sentence." Yet under the Court's own interpretation, the word "sentence" when used as a verb refers to the imposition of a fixed period of incarceration; but when the word "sentence" next appears, as a noun, the Court concludes that it refers to a range of available punishment. Thus it is the Court's reading of the statute that fails " 'to give . . . a similar construction' " to a word used as both a noun and a verb in a single statutory sentence. See *ante*, at 46 (quoting *Reves* v. *Ernst & Young*, 507 U. S. 170, 177 (1993)). Under what I think is the correct reading of the statute, all that changes is what the defendant will be (or was) sentenced to—prison or probation; the word "sentence" itself does not change meanings.

The Court next contends that " '[p]robation and imprisonment are not fungible,' " *ante*, at 46 (citation omitted), and that its interpretation of the statute avoids the "shoal" supposedly encountered when explaining "how multiplying a sentence *of probation* by one-third can yield a sentence *of imprisonment*," *ante*, at 47. Probation and imprisonment, however, need not be fungible for this statute to make sense. They need only both be subsumed under the term "sentence," which, for the reasons previously stated, they are. See Black's Law Dictionary, at 1362 (defining "sentence" as a judgment imposing punishment, which may include "a fine, incarceration, or probation"). While tying the length of imprisonment to the length of the original sentence of probation might seem harsh to the Court, surely it is not an irrational method of calculation. Indeed, the Court does not question that Congress *could have* tied the length of imprisonment to the length of the original sentence of probation.

Congress in fact prescribed a similar method of calculation in a parallel provision of the Anti-Drug Abuse Act of 1988, 18 U. S. C. § 3583(g), which was added at the same time as § 3565(a) and which also sets out the punishment for defendants found in possession of a controlled substance. Section 3583(g) explicitly provides: "If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release." Considering that §§ 3565(a) and 3583(g) were enacted at the same time and are directed at precisely the same problem, it seems quite reasonable to construe them *in pari materia* to call for parallel treatment of drug offenders under noncustodial supervision. Whatever the differences between supervised release and probation, surely supervised release is more like probation than it is like imprisonment. That Congress explicitly chose in § 3583(g) to tie the length of imprisonment to the length of supervised release suggests quite strongly that Congress meant in § 3565(a) to use length of the original sentence of probation as the basis for calculation. At the very least, the method of calculation prescribed in § 3583(g) removes the imaginary "shoal" which blocks the Court's way to a sensible construction of § 3565(a).

The Court refuses to read these provisions *in pari materia* because a sentence of probation is normally—but not necessarily—longer than a period of supervised release. See *ante*, at 50–51, and n. 8. Simply because the end result of the calculation might be different in some cases, however, is not a persuasive reason for refusing to recognize the obvious similarity in the methods of calculation. Nor is it irrational for Congress to have decided that, in general, those defendants who have already been incarcerated should return to prison for a shorter time than those who have served no time in prison.

Here, as in other portions of its opinion, the Court expresses concern with the apparent harshness of the result if "original sentence" is interpreted to mean the sentence of probation initially imposed on a defendant.[8] In some cases the result may indeed appear harsh. Yet harsh punishment, in itself, is neither a legitimate ground for invalidating a statute nor cause for injecting ambiguity into a statute that is susceptible to principled statutory construction. See *Callanan* v. *United States*, 364 U. S. 587, 596 (1961) ("The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers"). A straightforward reading of § 3565(a) may in some cases call for imposition of severe punishment, but it does not produce "a result so absurd or glaringly unjust, as to raise a reasonable doubt about Congress' intent." *Chapman*, 500 U. S., at 463–464 (internal quotation marks and citations omitted).

The Court's interpretation of § 3565(a), finally, creates an incurable uncertainty: It offers no sound basis for choosing which point in the Guidelines range should serve as the basis for calculating a revocation sentence. After describing the four possible reference points within the range, the Court selects the maximum available sentence. It rejects selecting a point in the middle of the available range, because to do so "would be purely arbitrary." *Ante,* at 55. Yet the Court does not explain why choosing the top end of the range is any less arbitrary, or any more "sensible," than picking a point in the middle of the range. Indeed, the Court's selection smacks of awarding a consolation prize to the Government simply out of concern that the Government was mistakenly done out of victory in the main event. And choosing the *maximum possible sentence* under the Guidelines hardly seems consistent with the rule of lenity which the Court purports to apply.[9]

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[8] The Court expresses disbelief that Congress could have intended to authorize punishment for drug-possessing probationers so much more severe than the punishment authorized for the probationer's original offense. *Ante*, at 48–49. I think the Court misses two points. First, as the Court itself seems to recognize, the maximum punishment authorized for respondent's original offense is not the Guidelines range, but the maximum statutory sentence. See 18 U. S. C. §§ 1703(a), 3553(b), 3559(a)(4), and 3581(b)(4). In respondent's case, the punishment authorized for his original offense is therefore *exactly equal* to the punishment authorized for his probation violation—five years' imprisonment. See § 1703(a). Second, Congress provided for equally harsh revocation sentences in the subsections preceding and following § 3565(a). By allowing sentencing courts to impose "any other sentence that was available . . . at the time of the initial sentencing," §§ 3565(a)(2) and (b), Congress authorized these courts to impose the maximum statutory sentence upon revocation of probation. Thus, if respondent's probation had been revoked pursuant to §§ 3565(a)(2) or (b), he would have faced the same maximum revocation sentence he faces under § 3565(a)—five years' imprisonment.

A straightforward reading of §3565(a) creates no similar uncertainty. Because I think the language of §3565(a) is clear, I would apply it. Accordingly, I would reverse the Court of Appeals.

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[9] The Government suggests that if "original sentence" does not refer to the sentence of probation imposed, then it might just as readily refer to the statutory sentence. The Court rejects this suggestion because imposing the maximum statutory sentence would require an upward departure from the Guidelines range, and probation "is a most unlikely prospect" in any case involving an upward departure. *Ante,* at 56, n. 14. Thus, according to the Court, it "makes scant sense" to assume that "original sentence" is the statutory maximum sentence. *Ibid.* By the same reasoning, however, it makes little sense to assume that the maximum Guidelines sentence is the "original sentence," as probation is an "unlikely prospect" in any case where a defendant would otherwise receive the maximum available sentence under the Guidelines. Indeed, if the plausibility of the potential sentence is the Court's guide, one would think the Court would choose the bottom of the Guidelines range as its benchmark.

POWELL *v.* NEVADA

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 92–8841. Argued February 22, 1994—Decided March 30, 1994

Petitioner Powell was arrested on November 3, 1989, for felony child abuse. Not until November 7, however, did a Magistrate find probable cause to hold him for a preliminary hearing. The child in question subsequently died of her injuries, and Powell was charged additionally with her murder. At the trial, the state prosecutor presented prejudicial statements Powell had made to the police on November 7. The jury found him guilty and sentenced him to death. On appeal, the Nevada Supreme Court, *sua sponte,* raised the question whether the 4-day delay in judicial confirmation of probable cause violated the Fourth Amendment, in view of *County of Riverside* v. *McLaughlin,* 500 U. S. 44, which held that a judicial probable-cause determination must generally be made within 48 hours of a warrantless arrest, and that, absent extraordinary circumstances, a longer delay is unconstitutional. The state court decided that *McLaughlin* was inapplicable to Powell's case, because his prosecution commenced prior to the rendition of that decision.

Held: The Nevada Supreme Court erred in failing to recognize that *McLaughlin*'s 48-hour rule must be applied retroactively, for under *Griffith* v. *Kentucky,* 479 U. S. 314, 328, "a . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . not yet final" when the rule is announced. Although the 4-day delay here was presumptively unreasonable under *McLaughlin,* it does not necessarily follow that Powell must be set free or gain other relief. Several questions remain open for decision on remand, including the appropriate remedy for a delay in determining probable cause (an issue not resolved by *McLaughlin*), the consequence of Powell's failure to raise the federal question, and whether introduction at trial of what Powell said on November 7 was "harmless" in view of a similar, albeit shorter, statement he made prior to his arrest. Pp. 83–85.

108 Nev. 700, 838 P. 2d 921, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which BLACKMUN, STEVENS, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post,* p. 85.

Michael Pescetta argued the cause and filed briefs for petitioner.

Dan M. Seaton argued the cause and filed a brief for respondent.

Miguel A. Estrada argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris,* and *Deputy Solicitor General Bryson.**

JUSTICE GINSBURG delivered the opinion of the Court.

In *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), we held that the Fourth Amendment's shield against unreasonable seizures requires a prompt judicial determination of probable cause following an arrest made without a warrant and ensuing detention. *County of Riverside* v. *McLaughlin,* 500 U. S. 44 (1991), established that "prompt" generally means within 48 hours of the warrantless arrest; absent extraordinary circumstances, a longer delay violates the Fourth Amendment. In the case now before us, the Supreme Court of Nevada stated that *McLaughlin* does not apply to a prosecution commenced prior to the rendition of that decision. We hold that the Nevada Supreme Court misread this Court's precedent: "[A] . . . rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, . . . not yet final" when the rule is announced. *Griffith* v. *Kentucky,* 479 U. S. 314, 328 (1987).

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*Briefs of *amici curiae* urging affirmance were filed for the State of Utah et al. by *Jan Graham,* Attorney General of Utah, *Carol Clawson,* Solicitor General, and *J. Kevin Murphy,* Assistant Attorney General, *Grant Woods,* Attorney General of Arizona, *John M. Bailey,* Chief State's Attorney of Connecticut, *Robert A. Marks,* Attorney General of Hawaii, *Larry EchoHawk,* Attorney General of Idaho, *Robert T. Stephan,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Richard P. Ieyoub,* Attorney General of Louisiana, *Scott Harshbarger,* Attorney General of Massachusetts, *Joseph P. Mazurek,* Attorney General of Montana, *Fred DeVesa,* Attorney General of New Jersey, *Susan B. Loving,* Attorney General of Oklahoma, *Lee Fisher,* Attorney General of Ohio, and *T. Travis Medlock,* Attorney General of South Carolina; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

I

Petitioner Kitrich Powell was arrested on Friday, November 3, 1989, for felony child abuse of his girlfriend's 4-year-old daughter, in violation of Nev. Rev. Stat. § 200.508 (1991). That afternoon, the arresting officer prepared a sworn declaration describing the cause for and circumstances of the arrest. Not until November 7, 1989, however, did a Magistrate find probable cause to hold Powell for a preliminary hearing. That same day, November 7, Powell made statements to the police, prejudicial to him, which the prosecutor later presented at Powell's trial. Powell was not personally brought before a Magistrate until November 13, 1989. By that time, the child had died of her injuries, and Powell was charged additionally with her murder.

A jury found Powell guilty of first-degree murder and, following a penalty hearing, sentenced him to death. On appeal to the Nevada Supreme Court, Powell argued that the State had violated Nevada's "initial appearance" statute by failing to bring him before a magistrate within 72 hours, and that his conviction should therefore be reversed.

The Nevada statute governing appearances before a magistrate provides:

> "If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:
>
> "(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and
>
> "(b) May release the arrested person if he determines that the person was not brought before a magistrate without unnecessary delay." Nev. Rev. Stat. § 171.178(3) (1991).

Powell emphasized that 10 days had elapsed between his arrest on November 3, 1989, and his November 13 initial appearance before a Magistrate. In view of the incriminating statements he made on November 7, Powell contended, the unlawful delay was prejudicial to him. Under Nevada law, Powell asserted, vindication of his right to a speedy first appearance required that his conviction be reversed, and that he be set free. Appellant's Opening Brief in No. 22348 (Nev.), p. 85.

The district attorney maintained before the Nevada Supreme Court that there had been no fatal violation of Nevada's initial appearance statute. First, the district attorney urged, the confirmation of probable cause by a Magistrate on November 7 occurred within 72 hours of the November 3 arrest (excluding the intervening weekend). This probable-cause finding, the district attorney contended, satisfied the 72-hour prescription of Nev. Rev. Stat. § 171.178. In any event, the district attorney continued, under Nevada law, an accused waives his right to a speedy arraignment when he voluntarily waives his right to remain silent and his right to counsel. Powell did so, the district attorney said, when he made his November 7 statements, after he was read his *Miranda* rights and waived those rights. See Respondent's Answering Brief in No. 22348 (Nev.), pp. 56–60. In reply, Powell vigorously contested the district attorney's portrayal of the probable-cause determination as tantamount to an initial appearance sufficient to satisfy Nev. Rev. Stat. § 171.178's 72-hour prescription. Powell pointed out that he "was neither present [n]or advised of the magistrate's finding." Appellant's Reply Brief in No. 22348 (Nev.), p. 1.

The Nevada Supreme Court concluded, in accord with the district attorney's assertion, that Powell had waived his right under state law to a speedy arraignment. 108 Nev. 700, 705, 838 P. 2d 921, 924–925 (1992). If the Nevada Supreme Court had confined the decision to that point, its opinion would have resolved no federal issue. But the Nevada Supreme Court said more. Perhaps in response to the district attorney's contention that the Magistrate's November 7 probable-cause notation satisfied Nev. Rev. Stat. § 171.178 (a contention the State now disavows), the Nevada Supreme Court, *sua sponte,* raised a federal concern. That court detoured from its state-law analysis to inquire whether the November 3 to November 7, 1989, delay in judicial confirmation of probable cause violated the Fourth Amendment under this Court's precedents.

County of Riverside v. *McLaughlin,* 500 U. S. 44 (1991), the Nevada Supreme Court recognized, made specific the probable-cause promptness requirement of *Gerstein* v. *Pugh,* 420 U. S. 103 (1975); *McLaughlin* instructed that a delay exceeding 48 hours presumptively violates the Fourth Amendment. Merging the speedy initial appearance required by Nevada statute and the prompt probable-cause determination required by the Fourth Amendment, the Nevada Supreme Court declared: "The *McLaughlin* case renders [Nev. Rev. Stat. §]171.178(3) unconstitutional insofar [as] it permits an initial appearance up to seventy-two hours after arrest and instructs that non-judicial days be excluded from the calculation of those hours." 108 Nev., at 705, 838 P. 2d, at 924. While instructing that, henceforth, probable-cause determinations be made within 48 hours of a suspect's arrest, the Nevada Supreme Court held *McLaughlin* inapplicable "to the case at hand," because that recent precedent postdated Powell's arrest. 108 Nev., at 705, n. 1, 838 P. 2d, at 924, n. 1. *McLaughlin* announced a new rule, the Nevada Supreme Court observed, and therefore need not be applied retroactively. 108 Nev., at 705, n. 1, 838 P. 2d, at 924, n. 1.

Powell petitioned for our review raising the question whether a state court may decline to apply a recently rendered Fourth Amendment decision of this Court to a case pending on direct appeal. We granted certiorari, 510 U. S. 811 (1993), and now reject the state court's prospectivity declaration.

II

Powell's arrest was not validated by a magistrate until four days elapsed. That delay was presumptively unreasonable under *McLaughlin's* 48-hour rule. The State so concedes. Appellee's Answer to Petition for Rehearing in No. 22348 (Nev.), p. 7; Tr. of Oral Arg. 28. The State further concedes that the Nevada Supreme Court's retroactivity analysis was incorrect. See *ibid.* We held in *Griffith* v. *Kentucky,* 479 U. S., at 328, that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith* stressed two points. First, "the nature of judicial review . . . precludes us from '[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.,* at 323 (quoting *Mackey* v. *United States,* 401 U. S. 667, 679 (1971) (Harlan, J., concurring in judgment)). Second, "selective application of new rules violates the principle of treating similarly situated defendants the same." *Griffith, supra,* at 323. Assuming, *arguendo,* that the 48-hour presumption announced in *McLaughlin* qualifies as a "new rule," cf. *Teague* v. *Lane,* 489 U. S. 288, 299–310 (1989), *Griffith* nonetheless entitles Powell to rely on *McLaughlin* for this simple reason: Powell's conviction was not final when *McLaughlin* was announced.

It does not necessarily follow, however, that Powell must "be set free," 108 Nev., at 705, n. 1, 838 P. 2d, at 924, n. 1, or gain other relief, for several questions remain open for decision on remand. In particular, the Nevada Supreme Court has not yet closely considered the appropriate remedy for a delay in determining probable cause (an issue not resolved by *McLaughlin*), or the consequences of Powell's failure to raise the federal question, or the district attorney's argument that introduction at trial of what Powell said on November 7, 1989, was "harmless" in view of a similar, albeit shorter, statement Powell made on November 3, prior to his arrest. See Brief for Respondent 22. Expressing no opinion on these issues,* we hold only that the Nevada Supreme Court erred in failing to recognize that *Griffith* v. *Kentucky* calls for retroactive application of *McLaughlin*'s 48-hour rule.

* * *

For the reasons stated, the judgment of the Nevada Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

After concluding that the Nevada Supreme Court erred by failing to follow our decision in *Griffith* v. *Kentucky*, 479 U. S.

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*JUSTICE THOMAS would reach out and decide the first of these questions, though it is not presented in the petition for review. He would rule inappropriate "suppression of [Powell's November 7] statement . . . because the statement was not a product of the *McLaughlin* violation." *Post*, at 89. It is "settled law," he maintains, *post*, at 88, that if probable cause in fact existed for Powell's detention, then *McLaughlin*'s 48-hour rule, though violated, triggers no suppression remedy. Quite the opposite, JUSTICE THOMAS recognizes, is "settled law" regarding search warrants: A court's postsearch validation of probable cause will not render the evidence admissible. See *Vale* v. *Louisiana*, 399 U. S. 30, 35, 34 (1970) (absent circumstances justifying a warrantless search, it is "constitutional error [to] admi[t] into evidence the fruits of the illegal search," "even though the authorities ha[d] probable cause to conduct it").

JUSTICE THOMAS maintains, however, that our precedents, especially *New York* v. *Harris*, 495 U. S. 14 (1990), already establish that no suppression is required in Powell's case. In *Harris*, we held that violation of the Fourth Amendment's rule against warrantless arrests in a dwelling, see *Payton* v. *New York*, 445 U. S. 573 (1980), generally does not lead to the suppression of a postarrest confession. But Powell does not complain of police failure to obtain a required arrest warrant. He targets a different constitutional violation—failure to obtain authorization from a magistrate for a significant period of pretrial detention. Whether a suppression remedy applies in that setting remains an unresolved question. Because the issue was not raised, argued, or decided below, we should not settle it here.

314 (1987), the Court remands this case without deciding whether the ultimate judgment below, despite the error, was correct. In my view, the lower court's judgment upholding petitioner's conviction was correct under settled legal principles, and therefore should be affirmed.

I

The petition for certiorari in this case presented a single question for review—namely, whether a particular decision of this Court concerning criminal procedure should apply retroactively to all cases pending on direct review. This question was well settled at the time the petition was filed, and had been since our decision in *Griffith,* in which we stated that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U. S., at 328. The Nevada Supreme Court made a statement to the contrary in a footnote in its opinion. See *infra,* at 87. Notwithstanding this obvious mistake, *Griffith's* rule of retroactivity had generated little or no confusion among the lower courts. In my view, under these circumstances, the writ was improvidently granted.

According to this Court's Rule 10.1, "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Not only were there no special or important reasons favoring review in this case, but, as Justice Stewart once wrote: "The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties]." *Butz* v. *Glover Livestock Commission Co.,* 411 U. S. 182, 189 (1973) (dissenting opinion). As the Court has observed in the past, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923). We make poor use of judicial resources when, as here, we take a case merely to reaffirm (without revisiting) settled law. See generally *Estelle* v. *Gamble*, 429 U. S. 97, 115 (1976) (STEVENS, J., dissenting); *United States* v. *Shannon*, 342 U. S. 288, 294–295 (1952) (opinion of Frankfurter, J.).

Now that we have invested time and resources in full briefing and oral argument, however, we must decide how properly to dispose of the case. The Court vacates and remands because the Nevada Supreme Court erred, not in its judgment, but rather in its "prospectivity declaration." *Ante*, at 83. The "declaration" to which the Court refers is the state court's statement that our decision in *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991), does "not apply retroactively." 108 Nev. 700, 705, n. 1, 838 P. 2d 921, 924, n. 1 (1992). The Court correctly rules that *McLaughlin* does apply retroactively. See *Griffith, supra*. Rather than remanding, I believe that the Court in this instance can and should definitively resolve the case before us: "Our job . . . is to review judgments, not to edit opinions . . . ." *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797, 823 (1985) (STEVENS, J., concurring in part and dissenting in part). See also *K mart Corp.* v. *Cartier, Inc.*, 485 U. S. 176, 185 (1988); *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956).

Of course, when there is a need for further factfinding or for proceedings best conducted in the lower courts, or where the ultimate question to be decided depends on debatable points of law that have not been briefed or argued, we regularly determine that the best course is to remand. See, *e. g.*, *Pierce* v. *Underwood*, 487 U. S. 552, 574 (1988) (vacating award of attorney's fees and remanding for recalculation of fee award). Those concerns, however, do not require a remand in this case. In defense of the judgment below, respondent and its *amici* have properly raised a number of arguments, see *Blum* v. *Bacon,* 457 U. S. 132, 137, n. 5 (1982), which have been fully briefed. As I explain below, at least one of those arguments provides a ground for decision that would require only the application of settled law to the undisputed facts in the record before us. Under these circumstances, remanding will merely require the needless expenditure of further judicial resources on a claim that lacks merit.

II

While in petitioner's care on November 2, 1989, 4-year-old Melea Allen suffered massive head and spinal injuries. When petitioner took her to the hospital the following day, November 3, she was comatose and suffering respiratory failure. Petitioner told doctors and nurses that she had fallen from his shoulders during play. When emergency room personnel discovered that Melea also had numerous bruises and lacerations on her body—injuries that suggested she had been abused repeatedly—they called the police. Petitioner spoke to the officers who responded to the call and again explained that the child's injuries were the result of an accidental fall.

Several hours later, the police arrested petitioner for child abuse. Within an hour of the arrest, officers prepared a declaration of arrest that recited the above facts to establish probable cause. Petitioner was still in custody on November 7, when, after receiving *Miranda* warnings, he agreed to give a second statement to the police. He repeated the same version of events he had given at the hospital before his arrest, but in slightly more detail. On that same day, a Magistrate, relying on the facts recited in the declaration of arrest described above, determined that petitioner's arrest had been supported by probable cause. The next day Melea died, and petitioner was charged with first-degree murder.

Petitioner contends that respondent's delay in securing a prompt judicial determination of probable cause to arrest him for child abuse violated the rule that a probable-cause determination must, absent extenuating circumstances, be made by a judicial officer within 48 hours of a warrantless arrest. *McLaughlin, supra.* The *McLaughlin* error, petitioner argues, required suppression of the custodial statement he made on November 7, which was introduced against him at trial.

Against that argument, respondent and its *amici* raise several contentions: first, that suppression of evidence would never be an appropriate remedy for a *McLaughlin* violation; second, that the statement at issue here was not a product of the *McLaughlin* error, or at least that the connection between the *McLaughlin* violation and the statement is so attenuated that suppression is not required; third, that suppression is inappropriate under *Illinois* v. *Krull,* 480 U. S. 340 (1987), because the officers acted in good-faith reliance on a state statute that authorized delays of up to 72 hours (excluding weekends and holidays) in presenting a defendant to a magistrate; and finally, that even if the statement should have been suppressed, admitting it at trial was harmless error. Even assuming, *arguendo,* that suppression is a proper remedy for *McLaughlin* errors, see *ante,* at 85, n., I believe that, on the facts of this case, suppression of petitioner's statement would not be appropriate because the statement was not a product of the *McLaughlin* violation.

Our decisions make clear "that evidence will not be excluded as 'fruit' [of an unlawful act] unless the illegality is at least the 'but for' cause of the discovery of the evidence." *Segura* v. *United States,* 468 U. S. 796, 815 (1984). As *Segura* suggests, "but for" causation is a necessary, but not sufficient, condition for suppression: "[W]e have declined to adopt a *per se* or but for rule that would make inadmissible any evidence . . . which somehow came to light through a chain of causation that began with a [violation of the Fourth or Fifth Amendment]." *New York* v. *Harris,* 495 U. S. 14, 17

(1990) (internal quotation marks omitted). See also *United States* v. *Ceccolini,* 435 U. S. 268, 276 (1978).

Contrary to petitioner's arguments, the violation of *McLaughlin* (as opposed to his *arrest* and *custody*) bore no causal relationship whatsoever to his November 7 statement. The timing of the probable-cause determination would have affected petitioner's statement only if a proper hearing at or before the 48-hour mark would have resulted in a finding of no probable cause. Yet, as the Magistrate found, the police had probable cause to suspect petitioner of child abuse, cf. *Illinois* v. *Gates,* 462 U. S. 213 (1983), and there is no suggestion that the delay in securing a determination of probable cause permitted the police to gather additional evidence to be presented to the Magistrate. On the contrary, the Magistrate based his determination on the facts included in the declaration of arrest that was completed within an hour of petitioner's arrest. Thus, if the probable-cause determination had been made within 48 hours as required by *McLaughlin,* the same information would have been presented, the same result would have obtained, and none of the circumstances of petitioner's custody would have been altered.

Moreover, it cannot be argued that the *McLaughlin* error somehow made petitioner's custody unlawful and thereby rendered the statement the product of unlawful custody. Because the arresting officers had probable cause to arrest petitioner, he was lawfully arrested at the hospital. Cf. *Harris, supra,* at 18.[1] The presumptively unconstitutional delay in securing a judicial determination of probable cause during a period of lawful custody did not render that custody illegal. We have never suggested that lawful custody becomes unlawful due to a failure to obtain a prompt judicial finding of probable cause—that is, probable cause does not disappear if not judicially determined within 48 hours. Cf. *United States* v. *Montalvo-Murillo*, 495 U. S. 711, 722 (1990) ("[A] person does not become immune from detention because of a timing violation").

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[1] The fact that the arrest was supported by probable cause and was not investigatory in nature fully distinguishes this case from our decisions in *Taylor* v. *Alabama,* 457 U. S. 687 (1982), *Brown* v. *Illinois,* 422 U. S. 590 (1975), and *Dunaway* v. *New York,* 442 U. S. 200 (1979). Where probable cause for an arrest is lacking, as it was in each of those cases, evidence obtained as a result of the Fourth Amendment violation "bear[s] a sufficiently close relationship to the underlying illegality [to require suppression]." *New York* v. *Harris,* 495 U. S. 14, 19 (1990). The presence of probable cause, by contrast, validates the arrest and attendant custody, despite "'technical' violations of Fourth Amendment rights" that may

In short, the statement does not even meet the threshold requirement of being a "product" of the *McLaughlin* violation.[2] Petitioner's statement, "while the product of an ar-

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have occurred during either. *Brown, supra*, at 611 (Powell, J., concurring in part). See also *Harris, supra*, at 18 (holding that even though the police violated the rule of *Payton* v. *New York*, 445 U. S. 573 (1980), by arresting a suspect in his house without a warrant, the resulting custody was lawful because the arrest was supported by probable cause, and that therefore the suspect's subsequent custodial statement was admissible).

As the Court notes, *ante*, at 85, n., a different rule applies to search warrants. In that context, we have insisted that, absent exigent circumstances, police officers obtain a search warrant, even if they had probable cause to conduct the search, see, *e. g., Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971), and we have required suppression of all fruits of an unlawful search, unless an exception to the exclusionary rule applies. See generally *Illinois* v. *Krull*, 480 U. S. 340, 347–349 (1987). The same rule has not been applied to arrests. "[W]hile the Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Gerstein* v. *Pugh*, 420 U. S. 103, 113 (1975) (citations omitted). Nor has the Court required suppression of voluntary custodial statements made after an arrest supported by probable cause based solely on the officers' failure to obtain a warrant. See *Harris, supra*. Petitioner's statement was the product of his arrest and custody, and there is no reason to think that the rules we have developed in the search warrant context should apply in this case.

[2] Thus, conventional attenuation principles are inapplicable in this case, for as we pointed out in *Harris*, "attenuation analysis is only appropriate where, as a threshold matter, courts determine that 'the challenged evidence is in some sense the product of illegal governmental activity.'" 495 U. S., at 19 (quoting *United States* v. *Crews*, 445 U. S. 463, 471 (1980)).

rest and being in custody, was not the fruit of the fact" that a judicial determination of probable cause was not made within the 48-hour period mandated by *McLaughlin*. *Harris, supra,* at 20. Under these circumstances, suppression is not warranted under our precedents.

* * *

For the foregoing reasons, the judgment below should be affirmed.

I respectfully dissent.

OREGON WASTE SYSTEMS, INC. *v.* DEPARTMENT OF ENVIRONMENTAL QUALITY OF THE STATE OF OREGON ET AL.

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 93–70. Argued January 18, 1994—Decided April 4, 1994*

Oregon imposes a $2.25 per ton surcharge on the in-state disposal of solid waste generated in other States and an $0.85 per ton fee on the disposal of waste generated within Oregon. Petitioners sought review of the out-of-state surcharge in the State Court of Appeals, challenging the administrative rule establishing the surcharge and its enabling statutes under, *inter alia,* the Commerce Clause. The court upheld the statutes and rule, and the State Supreme Court affirmed. Despite the Oregon statutes' explicit reference to out-of-state waste's geographical location, the court reasoned, the surcharge's express nexus to actual costs incurred by state and local government rendered it a facially constitutional "compensatory fee."

Held: Oregon's surcharge is facially invalid under the negative Commerce Clause. Pp. 98–108.

(a) The first step in analyzing a law under the negative Commerce Clause is to determine whether it discriminates against, or regulates evenhandedly with only incidental effects on, interstate commerce. If the restriction is discriminatory—*i. e.,* favors in-state economic interests over their out-of-state counterparts—it is virtually *per se* invalid. By contrast, nondiscriminatory regulations are valid unless the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142. Oregon's surcharge is obviously discriminatory on its face. It subjects waste from other States to a fee almost three times greater than the charge imposed on in-state waste, and the statutory determinant for whether the fee applies is whether or not the waste was generated out of state. The alleged compensatory aim of the surcharge has no bearing on whether it is facially discriminatory. See *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334, 340–341. Pp. 98–100.

(b) Because the surcharge is discriminatory, the virtually *per se* rule of invalidity—not the *Pike* balancing test—provides the proper legal

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*Together with No. 93–108, *Columbia Resource Co.* v. *Environmental Quality Commission of the State of Oregon,* also on certiorari to the same court.

standard for these cases. Thus, the surcharge must be invalidated unless respondents can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Neither of respondents' justifications passes strict scrutiny. For the surcharge to be justified as a "compensatory tax" necessary to make shippers of out-of-state waste pay their "fair share" of disposal costs, it must be the rough equivalent of an identifiable and substantially similar surcharge on intrastate commerce. However, respondents have failed to identify a specific charge on intrastate commerce equal to or exceeding the surcharge; the $0.85 per ton fee on in-state waste is only about one-third of the challenged surcharge. Even assuming that various other means of general taxation, such as state income taxes, could serve as a roughly equivalent intrastate burden, respondents' argument fails because the levies are not imposed on substantially equivalent events: Taxes on earning income and utilizing Oregon landfills are entirely different kinds of taxes. Nor can the surcharge be justified by respondents' argument that Oregon has a valid interest in spreading the costs of the disposal of Oregon waste, but not out-of-state waste, to all Oregonians. Because Oregon's scheme necessarily results in shippers of out-of-state waste bearing the full costs of disposal with shippers of Oregon waste bearing less than the full cost, it necessarily incorporates an illegitimate protectionist objective. *Wyoming* v. *Oklahoma*, 502 U. S. 437, 454. Recharacterizing the surcharge as "resource protectionism"—discouraging the importation of out-of-state waste in order to conserve more landfill space for in-state waste—hardly advances respondents' cause. A State may not accord its own inhabitants a preferred right of access over consumers in other States to its natural resources. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 627. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, distinguished. Pp. 100–107.

316 Ore. 99, 849 P. 2d 500, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. REHNQUIST, C. J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 108.

Andrew J. Pincus argued the cause for petitioners in both cases. With him on the briefs for petitioners in No. 93–70 were *James E. Benedict* and *J. Laurence Cable*. *John DiLorenzo, Jr.*, filed briefs for petitioner in No. 93–108.

Thomas A. Balmer, Deputy Attorney General of Oregon, argued the cause for respondents in both cases. With him on the brief were *Theodore R. Kulongoski*, Attorney General, *Virginia L. Linder*, Solicitor General, and *Michael D. Reynolds*, Assistant Solicitor General.†

JUSTICE THOMAS delivered the opinion of the Court.

Two Terms ago, in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S. 334 (1992), we held that the negative Commerce Clause prohibited Alabama from imposing a higher fee on the disposal in Alabama landfills of hazardous waste from other States than on the disposal of identical waste from Alabama. In reaching that conclusion, however, we left open the possibility that such a differential surcharge might be valid if based on the costs of disposing of waste from other States. *Id.*, at 346, n. 9. Today, we must decide whether Oregon's purportedly cost-based surcharge on the in-state disposal of solid waste generated in other States violates the Commerce Clause.

I

Like other States, Oregon comprehensively regulates the disposal of solid wastes within its borders.[1] Respondent

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†A brief of *amici curiae* urging affirmance was filed for the State of Indiana et al. by *Pamela Carter*, Attorney General of Indiana, and *Arend J. Abel*, *Matthew R. Gutwein*, and *Myra P. Spicker*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Winston Bryant* of Arkansas, *Robert A. Butterworth* of Florida, *Chris Gorman* of Kentucky, *Michael E. Carpenter* of Maine, *Mike Moore* of Mississippi, *Joseph P. Mazurek* of Montana, *Lee Fisher* of Ohio, *Susan B. Loving* of Oklahoma, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Joseph B. Meyer* of Wyoming, and *James E. Doyle* of Wisconsin.

[1] Oregon defines "solid wastes" as "all putrescible and nonputrescible wastes, including but not limited to garbage, rubbish, refuse, ashes, waste paper and cardboard; sewage sludge, septic tank and cesspool pumpings or other sludge; commercial, industrial, demolition and construction wastes; discarded or abandoned vehicles or parts thereof; discarded home and industrial appliances; manure, vegetable or animal solid and semisolid wastes, dead animals, infectious waste . . . and other wastes." Ore. Rev. Stat. § 459.005(27) (1991). Hazardous wastes are not considered solid wastes. § 459.005(27)(a).

Oregon Department of Environmental Quality oversees the State's regulatory scheme by developing and executing plans for the management, reduction, and recycling of solid wastes. To fund these and related activities, Oregon levies a wide range of fees on landfill operators. See, *e. g.*, Ore. Rev. Stat. §§459.235(3), 459.310 (1991). In 1989, the Oregon Legislature imposed an additional fee, called a "surcharge," on "every person who disposes of solid waste generated out-of-state in a disposal site or regional disposal site." §459.297(1) (effective Jan. 1, 1991). The amount of that surcharge was left to respondent Environmental Quality Commission (Commission) to determine through rulemaking, but the legislature did require that the resulting surcharge "be based on the costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state which are not otherwise paid for" under specified statutes. §459.298. At the conclusion of the rulemaking process, the Commission set the surcharge on out-of-state waste at $2.25 per ton. Ore. Admin. Rule 340–97–120(7) (Sept. 1993).

In conjunction with the out-of-state surcharge, the legislature imposed a fee on the in-state disposal of waste generated within Oregon. See Ore. Rev. Stat. §§459A.110(1), (5) (1991). The in-state fee, capped by statute at $0.85 per ton (originally $0.50 per ton), is considerably lower than the fee imposed on waste from other States. §§459A.110(5) and 459A.115. Subsequently, the legislature conditionally extended the $0.85 per ton fee to out-of-state waste, in addition to the $2.25 per ton surcharge, §459A.110(6), with the proviso that if the surcharge survived judicial challenge, the $0.85 per ton fee would again be limited to in-state waste. 1991 Ore. Laws, ch. 385, §§91–92.[2]

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[2] As a result, shippers of out-of-state solid waste currently are being charged $3.10 per ton to dispose of such waste in Oregon landfills, as compared to the $0.85 per ton fee charged to dispose of Oregon waste in those same landfills. We refer hereinafter only to the $2.25 surcharge, because the $0.85 per ton fee, which will be refunded to shippers of out-of-state

The anticipated court challenge was not long in coming. Petitioners, Oregon Waste Systems, Inc. (Oregon Waste), and Columbia Resource Company (CRC), joined by Gilliam County, Oregon, sought expedited review of the out-of-state surcharge in the Oregon Court of Appeals. Oregon Waste owns and operates a solid waste landfill in Gilliam County, at which it accepts for final disposal solid waste generated in Oregon and in other States. CRC, pursuant to a 20-year contract with Clark County, in neighboring Washington State, transports solid waste via barge from Clark County to a landfill in Morrow County, Oregon. Petitioners challenged the administrative rule establishing the out-of-state surcharge and its enabling statutes under both state law and the Commerce Clause of the United States Constitution. The Oregon Court of Appeals upheld the statutes and rule. *Gilliam County* v. *Department of Environmental Quality*, 114 Ore. App. 369, 837 P. 2d 965 (1992).

The State Supreme Court affirmed. *Gilliam County* v. *Department of Environmental Quality of Oregon*, 316 Ore. 99, 849 P. 2d 500 (1993). As to the Commerce Clause, the court recognized that the Oregon surcharge resembled the Alabama fee invalidated in *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S. 334 (1992), in that both prescribed higher fees for the disposal of waste from other States. Nevertheless, the court viewed the similarity as superficial only. Despite the explicit reference in § 459.297(1) to out-of-state waste's geographic origin, the court reasoned, the Oregon surcharge is not facially discriminatory "[b]ecause of [its] express nexus to actual costs incurred [by state and local government]." 316 Ore., at 112, 849 P. 2d, at 508. That nexus distinguished *Chemical Waste, supra*, by rendering the surcharge a "compensatory fee," which the court viewed as "*prima facie* reasonable," that is to say, facially constitutional. 316 Ore., at 112, 849 P. 2d, at 508. The court read

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waste if the surcharge is upheld, 1991 Ore. Laws, ch. 385, § 92, is not challenged here.

our case law as invalidating compensatory fees only if they are " 'manifestly disproportionate to the services rendered.' " *Ibid.* (quoting *Clark* v. *Paul Gray, Inc.,* 306 U. S. 583, 599 (1939)). Because Oregon law restricts the scope of judicial review in expedited proceedings to deciding the facial legality of administrative rules and the statutes underlying them, Ore. Rev. Stat. § 183.400 (1991), the Oregon court deemed itself precluded from deciding the factual question whether the surcharge on out-of-state waste was disproportionate. 316 Ore., at 112, 849 P. 2d, at 508.

We granted certiorari, 509 U. S. 953 (1993), because the decision below conflicted with a recent decision of the United States Court of Appeals for the Seventh Circuit.[3] We now reverse.

II

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a "negative" aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. See, *e. g., Wyoming* v. *Oklahoma,* 502 U. S. 437, 454 (1992); *Welton* v. *Missouri,* 91 U. S. 275 (1876). The Framers granted Congress plenary authority over interstate commerce in "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma,* 441 U. S. 322, 325–326 (1979). See generally The Federalist No. 42 (J. Madison). "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, . . . has as its corollary that the states are not separable economic units." *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 537–538 (1949).

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[3] *Government Suppliers Consolidating Servs., Inc.* v. *Bayh,* 975 F. 2d 1267 (1992), cert. denied, 506 U. S. 1053 (1993).

Consistent with these principles, we have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Hughes, supra,* at 336. See also *Chemical Waste,* 504 U. S., at 340–341. As we use the term here, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. *Id.,* at 344, n. 6. See also *Philadelphia* v. *New Jersey,* 437 U. S. 617, 624 (1978). By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970).

In *Chemical Waste,* we easily found Alabama's surcharge on hazardous waste from other States to be facially discriminatory because it imposed a higher fee on the disposal of out-of-state waste than on the disposal of identical in-state waste. 504 U. S., at 342. We deem it equally obvious here that Oregon's $2.25 per ton surcharge is discriminatory on its face. The surcharge subjects waste from other States to a fee almost three times greater than the $0.85 per ton charge imposed on solid in-state waste. The statutory determinant for which fee applies to any particular shipment of solid waste to an Oregon landfill is whether or not the waste was "generated out-of-state." Ore. Rev. Stat. § 459.297(1) (1991). It is well established, however, that a law is discriminatory if it "'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Chemical Waste, supra,* at 342 (quoting *Armco Inc.* v. *Hardesty,* 467 U. S. 638, 642 (1984)). See also *American Trucking Assns., Inc.* v. *Scheiner,* 483 U. S. 266, 286 (1987).[4]

Respondents argue, and the Oregon Supreme Court held, that the statutory nexus between the surcharge and "the [otherwise uncompensated] costs to the State of Oregon and its political subdivisions of disposing of solid waste generated out-of-state," Ore. Rev. Stat. § 459.298 (1991), necessarily precludes a finding that the surcharge is discriminatory. We find respondents' narrow focus on Oregon's compensatory aim to be foreclosed by our precedents. As we reiterated in *Chemical Waste,* the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory. See 504 U. S., at 340–341. See also *Philadelphia, supra,* at 626. Consequently, even if the surcharge merely recoups the costs of disposing of out-of-state waste in Oregon, the fact remains that the differential charge favors shippers of Oregon waste over their counterparts handling waste generated in other States. In making that geographic distinction, the surcharge patently discriminates against interstate commerce.

III

Because the Oregon surcharge is discriminatory, the virtually *per se* rule of invalidity provides the proper legal standard here, not the *Pike* balancing test. As a result, the surcharge must be invalidated unless respondents can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988). See also *Chemical Waste, supra*, at 342–343. Our cases require that justifications for discriminatory restrictions on commerce pass the "strictest scrutiny." *Hughes*, 441 U. S., at 337. The State's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Ibid.* See also *Westinghouse Elec. Corp.* v. *Tully*, 466 U. S. 388, 406–407 (1984); *Maryland* v. *Louisiana*, 451 U. S. 725, 759–760 (1981).

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[4] The dissent argues that the $2.25 per ton surcharge is so minimal in amount that it cannot be considered discriminatory, even though the surcharge expressly applies only to waste generated in other States. *Post,* at 115. The dissent does not attempt to reconcile that novel understanding of discrimination with our precedents, which clearly establish that the degree of a differential burden or charge on interstate commerce "measures only the *extent* of the discrimination" and "is of no relevance to the determination whether a State has discriminated against interstate commerce." *Wyoming* v. *Oklahoma,* 502 U. S. 437, 455 (1992). See also, *e. g., Maryland* v. *Louisiana,* 451 U. S. 725, 760 (1981) ("We need not know how unequal [a] [t]ax is before concluding that it . . . discriminates").

At the outset, we note two justifications that respondents have *not* presented. No claim has been made that the disposal of waste from other States imposes higher costs on Oregon and its political subdivisions than the disposal of in-state waste.[5] Also, respondents have not offered any safety or health reason unique to nonhazardous waste from other States for discouraging the flow of such waste into Oregon. Cf. *Maine* v. *Taylor*, 477 U. S. 131 (1986) (upholding ban on importation of out-of-state baitfish into Maine because such baitfish were subject to parasites completely foreign to Maine baitfish). Consequently, respondents must come forward with other legitimate reasons to subject waste from other States to a higher charge than is levied against waste from Oregon.

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[5] In fact, the Commission fixed the $2.25 per ton cost of disposing of solid waste in Oregon landfills without reference to the origin of the waste, 3 Record 665–690, and Oregon's economic consultant recognized that the per ton costs are the same for both in-state and out-of-state waste. *Id.*, at 731–732, 744. Of course, if out-of-state waste did impose higher costs on Oregon than in-state waste, Oregon could recover the increased cost through a differential charge on out-of-state waste, for then there would be a "reason, apart from its origin, why solid waste coming from outside the [State] should be treated differently." *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 361 (1992). Cf. *Mullaney* v. *Anderson*, 342 U. S. 415, 417 (1952); *Toomer* v. *Witsell*, 334 U. S. 385, 399 (1948).

Respondents offer two such reasons, each of which we address below.

A

Respondents' principal defense of the higher surcharge on out-of-state waste is that it is a "compensatory tax" necessary to make shippers of such waste pay their "fair share" of the costs imposed on Oregon by the disposal of their waste in the State. In *Chemical Waste* we noted the possibility that such an argument might justify a discriminatory surcharge or tax on out-of-state waste. See 504 U. S., at 346, n. 9. In making that observation, we implicitly recognized the settled principle that interstate commerce may be made to "'pay its way.'" *Complete Auto Transit, Inc.* v. *Brady,* 430 U. S. 274, 281 (1977). See also *Maryland, supra,* at 754. "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden[s]." *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 254 (1938). See also *Henneford* v. *Silas Mason Co.,* 300 U. S. 577 (1937). Nevertheless, one of the central purposes of the Clause was to prevent States from "exacting *more* than a just share" from interstate commerce. *Department of Revenue of Wash.* v. *Association of Wash. Stevedoring Cos.,* 435 U. S. 734, 748 (1978) (emphasis added). See also *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 462 (1959).

At least since our decision in *Hinson* v. *Lott,* 8 Wall. 148 (1869), these principles have found expression in the "compensatory" or "complementary" tax doctrine. Though our cases sometimes discuss the concept of the compensatory tax as if it were a doctrine unto itself, it is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means. See *Chemical Waste, supra,* at 346, n. 9 (referring to the compensatory tax doctrine as a "justif[ication]" for a facially discriminatory tax). Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and "substantially similar" tax on intrastate commerce does not offend the negative Commerce Clause. *Maryland*, *supra*, at 758–759. See also *Tyler Pipe Industries, Inc.* v. *Washington State Dept. of Revenue*, 483 U. S. 232, 242–243 (1987); *Armco*, 467 U. S., at 643.

To justify a charge on interstate commerce as a compensatory tax, a State must, as a threshold matter, "identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate." *Maryland, supra*, at 758. Once that burden has been identified, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. See, *e. g.*, *Alaska* v. *Arctic Maid*, 366 U. S. 199, 204–205 (1961). Finally, the events on which the interstate and intrastate taxes are imposed must be "substantially equivalent"; that is, they must be sufficiently similar in substance to serve as mutually exclusive "prox[ies]" for each other. *Armco, supra*, at 643. As Justice Cardozo explained for the Court in *Henneford*, under a truly compensatory tax scheme "the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." 300 U. S., at 584.[6]

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[6] The Oregon Supreme Court, though terming the out-of-state surcharge a "compensatory fee," relied for its legal standard on our "user fee" cases. See 316 Ore. 99, 112, 849 P. 2d 500, 508 (1993) (citing, for example, *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U. S. 707 (1972), and *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583 (1939)). The compensatory tax cases cited in the text, rather than the user fee cases, are controlling here, as the latter apply only to "charge[s] imposed by the State for the use of state-owned or state-provided transportation or other facilities and services." *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 621 (1981). Because it is undisputed that, as in *Chemical Waste*, the landfills in question are owned by private entities, including Oregon Waste, the out-of-state surcharge is plainly not a user fee. Nev-

Although it is often no mean feat to determine whether a challenged tax is a compensatory tax, we have little difficulty concluding that the Oregon surcharge is not such a tax. Oregon does not impose a specific charge of at least $2.25 per ton on shippers of waste generated in Oregon, for which the out-of-state surcharge might be considered compensatory. In fact, the only analogous charge on the disposal of Oregon waste is $0.85 per ton, approximately one-third of the amount imposed on waste from other States. See Ore. Rev. Stat. §§ 459A.110(5), 459A.115 (1991). Respondents' failure to identify a specific charge on intrastate commerce equal to or exceeding the surcharge is fatal to their claim. See *Maryland,* 451 U. S., at 758.

Respondents argue that, despite the absence of a specific $2.25 per ton charge on in-state waste, intrastate commerce does pay its share of the costs underlying the surcharge through general taxation.[7] Whether or not that is true is difficult to determine, as "[general] tax payments are received for the general purposes of the [government], and are, upon proper receipt, lost in the general revenues." *Flast* v. *Cohen,* 392 U. S. 83, 128 (1968) (Harlan, J., dissenting). Even assuming, however, that various other means of general taxation, such as income taxes, could serve as an identifiable intrastate burden roughly equivalent to the out-of-state surcharge, respondents' compensatory tax argument fails because the in-state and out-of-state levies are not imposed on substantially equivalent events.

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ertheless, even if the surcharge could somehow be viewed as a user fee, it could not be sustained as such, given that it discriminates against interstate commerce. See *Evansville, supra,* at 717; *Guy* v. *Baltimore,* 100 U. S. 434 (1880). Cf. *Northwest Airlines, Inc.* v. *County of Kent,* 510 U. S. 355, 369 (1994) (A user fee is valid only to the extent it "does not discriminate against interstate commerce").

[7] We would note that respondents, like the dissent, *post,* at 112, ignore the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States.

The prototypical example of substantially equivalent taxable events is the sale and use of articles of trade. See *Henneford, supra.* In fact, use taxes on products purchased out of state are the only taxes we have upheld in recent memory under the compensatory tax doctrine. See *ibid.* Typifying our recent reluctance to recognize new categories of compensatory taxes is *Armco,* where we held that manufacturing and wholesaling are not substantially equivalent events. 467 U. S., at 643. In our view, earning income and disposing of waste at Oregon landfills are even less equivalent than manufacturing and wholesaling. Indeed, the very fact that in-state shippers of out-of-state waste, such as Oregon Waste, are charged the out-of-state surcharge even though they pay Oregon income taxes refutes respondents' argument that the respective taxable events are substantially equivalent. See *ibid.* We conclude that, far from being substantially equivalent, taxes on earning income and utilizing Oregon landfills are "entirely different kind[s] of tax[es]." *Washington* v. *United States,* 460 U. S. 536, 546, n. 11 (1983). We are no more inclined here than we were in *Scheiner* to "plunge . . . into the morass of weighing comparative tax burdens" by comparing taxes on dissimilar events. 483 U. S., at 289 (internal quotation marks omitted).[8]

B

Respondents' final argument is that Oregon has an interest in spreading the costs of the in-state disposal of Oregon waste to all Oregonians. That is, because all citizens of Oregon benefit from the proper in-state disposal of waste from Oregon, respondents claim it is only proper for Oregon to require them to bear more of the costs of disposing of such waste in the State through a higher general tax burden. At the same time, however, Oregon citizens should not be required to bear the costs of disposing of out-of-state waste, respondents claim. The necessary result of that limited cost shifting is to require shippers of out-of-state waste to bear the full costs of in-state disposal, but to permit shippers of Oregon waste to bear less than the full cost.

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[8] Furthermore, permitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of intrastate taxation "would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general state tax funds." *Government Suppliers Consolidating Servs., Inc.* v. *Bayh,* 975 F. 2d, at 1284. We decline respondents' invitation to open such an expansive loophole in our carefully confined compensatory tax jurisprudence.

We fail to perceive any distinction between respondents' contention and a claim that the State has an interest in reducing the costs of handling in-state waste. Our cases condemn as illegitimate, however, any governmental interest that is not "unrelated to economic protectionism," *Wyoming*, 502 U. S., at 454, and regulating interstate commerce in such a way as to give those who handle domestic articles of commerce a cost advantage over their competitors handling similar items produced elsewhere constitutes such protectionism. See *New Energy*, 486 U. S., at 275.[9] To give controlling effect to respondents' characterization of Oregon's tax scheme as seemingly benign cost spreading would require us to overlook the fact that the scheme necessarily incorporates a protectionist objective as well. Cf. *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 273 (1984) (rejecting Hawaii's attempt to justify a discriminatory tax exemption for local liquor producers as conferring a benefit on them, as opposed to burdening out-of-state liquor producers).

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[9] We recognize that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*" *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278 (1988). Cf. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869, 877, n. 6 (1985). Here, as in *New Energy*, we confront a patently discriminatory law that is plainly connected to the regulation of interstate commerce. We therefore have no occasion to decide whether Oregon could validly accomplish its limited cost spreading through the "market participant" doctrine, *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806–810 (1976), or other means unrelated to any regulation of interstate commerce.

Respondents counter that if Oregon is engaged in any form of protectionism, it is "resource protectionism," not economic protectionism. It is true that by discouraging the flow of out-of-state waste into Oregon landfills, the higher surcharge on waste from other States conserves more space in those landfills for waste generated in Oregon. Recharacterizing the surcharge as resource protectionism hardly advances respondents' cause, however. Even assuming that landfill space is a "natural resource," "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *Philadelphia,* 437 U. S., at 627. As we held more than a century ago, "if the State, under the guise of exerting its police powers, should [impose a burden] . . . applicable solely to articles [of commerce] . . . produced or manufactured in other States, the courts would find no difficulty in holding such legislation to be in conflict with the Constitution of the United States." *Guy* v. *Baltimore,* 100 U. S. 434, 443 (1880).

Our decision in *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U. S. 941 (1982), is not to the contrary. There we held that a State may grant a "limited preference" for its citizens in the utilization of ground water. *Id.,* at 956. That holding was premised on several different factors tied to the simple fact of life that "water, unlike other natural resources, is essential for human survival." *Id.,* at 952. *Sporhase* therefore provides no support for respondents' position that States may erect a financial barrier to the flow of waste from other States into Oregon landfills. See *Fort Gratiot,* 504 U. S., at 364–365, and n. 6. However serious the shortage in landfill space may be, *post,* at 108, "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade." *Chemical Waste,* 504 U. S., at 339–340, and 346, n. 9.

IV

We recognize that the States have broad discretion to configure their systems of taxation as they deem appropriate. See, *e. g., Commonwealth Edison Co.* v. *Montana,* 453 U. S. 609, 622–623 (1981); *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318, 336–337 (1977). All we intimate here is that their discretion in this regard, as in all others, is bounded by any relevant limitations of the Federal Constitution, in these cases the negative Commerce Clause. Because respondents have offered no legitimate reason to subject waste generated in other States to a discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge is facially invalid under the negative Commerce Clause. Accordingly, the judgment of the Oregon Supreme Court is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE BLACKMUN joins, dissenting.

Landfill space evaporates as solid waste accumulates. State and local governments expend financial and political capital to develop trash control systems that are efficient, lawful, and protective of the environment. The State of Oregon responsibly attempted to address its solid waste disposal problem through enactment of a comprehensive regulatory scheme for the management, disposal, reduction, and recycling of solid waste. For this Oregon should be applauded. The regulatory scheme included a fee charged on out-of-state solid waste. The Oregon Legislature directed the Environmental Quality Commission to determine the appropriate surcharge "based on the costs . . . of disposing of solid waste generated out-of-state." Ore. Rev. Stat. § 459.298 (1991). The Commission arrived at a surcharge of $2.25 per ton, compared to the $0.85 per ton charged on in-state solid waste. Ore. Admin. Rule 340–97–110(3) (Sept. 1993).[1] The surcharge works out to an increase of about $0.14 per week for the typical out-of-state solid waste producer.[2] Brief for Respondents 26–27, n. 16. This seems a small price to pay for the right to deposit your "garbage, rubbish, refuse . . . ; sewage sludge, septic tank and cesspool pumpings or other sludge; . . . manure, . . . dead animals, [and] infectious waste" on your neighbors. Ore. Rev. Stat. § 459.005(27) (1991).

Nearly 20 years ago, we held that a State cannot ban all out-of-state waste disposal in protecting themselves from hazardous or noxious materials brought across the State's borders. *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978). Two Terms ago in *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334 (1992), in striking down the State of Alabama's $72 per ton fee on the disposal of out-of-state hazardous waste, the Court left open the possibility that such a fee could be valid if based on the costs of disposing of waste from other States. *Id.,* at 346, n. 9. Once again, however, as in *Philadelphia* and *Chemical Waste Management,* the Court further cranks the dormant Commerce Clause ratchet against the States by striking down such cost-based fees, and by so doing ties the hands of the States in addressing the vexing national problem of solid waste disposal. I dissent.

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[1] The surcharge is composed of the following identified costs: $0.58—statewide activities for reducing environmental risks and improving solid waste management; $0.66—reimbursements to the State for tax credits and other public subsidies; $0.05—solid waste reduction activities related to the review and certification of waste reduction and recycling plans; $0.72—increased environmental liability; $0.20—lost disposal capacity; $0.03—publicly supported infrastructure; and $0.01—nuisance impacts from transportation. Pet. for Cert. in No. 93–108, p. 4.

[2] The $2.25 per ton fee imposed on out-of-state waste exceeds the $0.85 per ton fee imposed on in-state waste by $1.40 per ton. One ton equals 2,000 pounds. Assuming that the hypothetical nonresident generates 200 pounds of garbage per month (1/10 of a ton), the nonresident's garbage bill would increase by $0.14 per month.

Americans generated nearly 196 million tons of municipal solid waste in 1990, an increase from 128 million tons in 1975. See U. S. Environmental Protection Agency, Characterization of Municipal Solid Waste in the United States: 1992 Update, p. ES–3. Under current projections, Americans will produce 222 million tons of garbage in the year 2000. *Ibid.* Generating solid waste has never been a problem. Finding environmentally safe disposal sites has. By 1991, it was estimated that 45 percent of all solid waste landfills in the Nation had reached capacity. 56 Fed. Reg. 50980 (1991). Nevertheless, the Court stubbornly refuses to acknowledge that a clean and healthy environment, unthreatened by the improper disposal of solid waste, is the commodity really at issue in cases such as these, see, *e. g., Chemical Waste Management, supra,* at 350 (REHNQUIST, C. J., dissenting), and *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353, 368 (1992) (REHNQUIST, C. J., dissenting).

Notwithstanding the identified shortage of landfill space in the Nation, the Court notes that it has "little difficulty," *ante,* at 104, concluding that the Oregon surcharge does not operate as a compensatory tax, designed to offset the loss of available landfill space in the State caused by the influx of out-of-state waste. The Court reaches this nonchalant conclusion because the State has failed "to identify a specific charge on *intrastate* commerce equal to or exceeding the surcharge." *Ibid.* (emphasis added). The Court's myopic focus on "differential fees" ignores the fact that in-state producers of solid waste support the Oregon regulatory program through state income taxes and by paying, indirectly, the numerous fees imposed on landfill operators and the dumping fee on in-state waste. Ore. Rev. Stat. § 459.005 *et seq.* (1991).

We confirmed in *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U. S. 941 (1982), that a State may enact a comprehensive regulatory system to address an environmental problem or a threat to natural resources within the confines of the Commerce Clause. In the context of threatened ground water depletion, we stated that "[o]bviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Id.*, at 955–956. The same point could be made about a "clean and safe environment" in these cases: Where a State imposes restrictions on the ability of its own citizens to dispose of solid waste in an effort to promote a "clean and safe environment," it is not discriminating against interstate commerce by preventing the uncontrolled transfer of out-of-state solid waste into the State.

The availability of safe landfill disposal sites in Oregon did not occur by chance. Through its regulatory scheme, the State of Oregon inspects landfill sites, monitors waste streams, promotes recycling, and imposes an $0.85 per ton disposal fee on in-state waste, Ore. Rev. Stat. § 459.005 *et seq.* (1991), all in an effort to curb the threat that its residents will harm the environment and create health and safety problems through excessive and unmonitored solid waste disposal. Depletion of a clean and safe environment will follow if Oregon must accept out-of-state waste at its landfills without a sharing of the disposal costs. The Commerce Clause does not require a State to abide this outcome where the "natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage." *Sporhase, supra,* at 957. A shortage of available landfill space is upon us, 56 Fed. Reg. 50980 (1991), and with it comes the accompanying health and safety hazards flowing from the improper disposal of solid wastes. We have long acknowledged a distinction between economic protectionism and health and safety regulation promulgated by Oregon. See *H. P. Hood & Sons, Inc.* v. *Du Mond,* 336 U. S. 525, 533 (1949).

Far from neutralizing the economic situation for Oregon producers and out-of-state producers, the Court's analysis turns the Commerce Clause on its head. Oregon's neighbors will operate under a competitive advantage against their Oregon counterparts as they can now produce solid waste with reckless abandon and avoid paying concomitant state taxes to develop new landfills and clean up retired landfill sites. While I understand that solid waste is an article of commerce, *Philadelphia,* 437 U. S., at 622–623, it is not a commodity sold in the marketplace; rather it is disposed of at a cost to the State. Petitioners do not buy garbage to put in their landfills; solid waste producers pay petitioners to take their waste. Oregon solid waste producers do not compete with out-of-state businesses in the sale of solid waste. Thus, the fees do not alter the price of a product that is competing with other products for common purchasers. If anything, striking down the fees works to the disadvantage of Oregon businesses. They alone will have to pay the "nondisposal" fees associated with solid waste: landfill siting, landfill cleanup, insurance to cover environmental accidents, and transportation improvement costs associated with out-of-state waste being shipped into the State. While we once recognized that " 'the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies,' " *id.,* at 621, n. 4, quoting 42 U. S. C. § 6901(a)(4) (1976 ed.), the Court today leaves States with only two options: become a dumper and ship as much waste as possible to a less populated State, or become a dumpee, and stoically accept waste from more densely populated States.

The Court asserts that the State has not offered "any safety or health reason[s]" for discouraging the flow of solid waste into Oregon. *Ante,* at 101. I disagree. The availability of environmentally sound landfill space and the proper disposal of solid waste strike me as justifiable "safety or health" rationales for the fee. As far back as the turn of the century, the Court recognized that control over the collection and disposal of solid waste was a legitimate, nonarbitrary exercise of police powers to protect health and safety. See, *e. g., California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306 (1905) (holding that exclusive privilege to one company to dispose of the garbage in the city and county of San Francisco was not void as taking the property of householders for public use without compensation); and *Gardner* v. *Michigan,* 199 U. S. 325 (1905) (holding that property rights of individuals must be subordinated to the general good and if the owner of garbage suffers any loss by its destruction he is compensated therefor in the common benefit secured by the regulation requiring that all garbage be destroyed).

In exercising its legitimate police powers in regulating solid waste disposal, Oregon is not "needlessly obstruct[ing] interstate trade or attempt[ing] to place itself in a position of economic isolation." *Maine* v. *Taylor,* 477 U. S. 131, 151 (1986) (internal quotation marks omitted) (upholding Maine's ban on the importation of live baitfish on the ground that it serves the legitimate governmental interest in protecting Maine's indigenous fish population from parasites prevalent in out-of-state baitfish). Quite to the contrary, Oregon accepts out-of-state waste as part of its comprehensive solid waste regulatory program and it "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Ibid.* Moreover, Congress also has recognized taxes as an effective method of discouraging consumption of natural resources in other contexts. Cf. 26 U. S. C. §§4681, 4682 (1988 ed., Supp. IV) (tax on ozone-depleting chemicals); 26 U. S. C. §4064 (1988 ed. and Supp. IV) (gas guzzler excise tax). Nothing should change the analysis when the natural resource—landfill space—was created or regulated by the State in the first place.

In its sweeping ruling, the Court makes no distinction between publicly and privately owned landfills. It rejects the argument that our "user fee" cases apply in this context since the landfills owned by the petitioners are private and our user fee analysis applies only to "'charge[s] imposed by the State for the use of a state-owned or state-provided transportation or other facilities and services.'" *Ante,* at 103, n. 6, quoting *Commonwealth Edison Co.* v. *Montana,* 453 U. S. 609, 621 (1981). Rather than stopping there, however, the majority goes on to note that even if the Oregon surcharge could be viewed as a user fee, "it could not be sustained as such, given that it discriminates against interstate commerce." *Ante,* at 104, n. 6, citing *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.,* 405 U. S. 707, 717 (1972). There is no need to make this dubious assertion. We specifically left unanswered the question whether a state or local government could regulate disposal of out-of-state solid waste at landfills owned by the government in *Philadelphia, supra,* at 627, n. 6.

We will undoubtedly be faced with this question directly in the future as roughly 80 percent of landfills receiving municipal solid waste in the United States are state or locally owned. U. S. Environmental Protection Agency, Resource Conservation and Recovery Act, Subtitle D Study: Phase 1 Report, p. 4–7 (Oct. 1986) (Table 4–2). We noted in *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U. S. 82, 93 (1984): "[I]f a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities." See also *Wyoming* v. *Oklahoma,* 502 U. S. 437, 459 (1992). Similarly, if the State owned and operated a park or recreational facility, it would be allowed to charge differential fees for in-state and out-of-state users of the resource. See, *e. g., Baldwin* v. *Fish and Game Comm'n of Mont.,* 436 U. S. 371 (1978) (upholding Montana's higher nonresident elk hunting license fees to compensate the State for conservation expenditures from taxes which only residents pay). More recently we upheld such differential fees under a reasonableness standard in *Northwest Airlines, Inc.* v. *County of Kent,* 510 U. S. 355 (1994), despite the fact that the fees were not precisely tied to the costs of the services provided at the publicly owned airport. We relied on our Commerce Clause analysis from *Evansville, supra.* We stated in *Evansville:*

> "At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users." *Id.,* at 716–717.

I think that the $2.25 per ton fee that Oregon imposes on out-of-state waste works out to a similar "fair approximation" of the privilege to use its landfills. Even the Court concedes that our precedents do not demand anything beyond "substantia[l] equivalen[cy]" between the fees charged on in-state and out-of-state waste. *Ante,* at 103 (internal quotation marks omitted). The $0.14 per week fee imposed on out-of-state waste producers qualifies as "substantially equivalent" under the reasonableness standard of *Northwest Airlines* and *Evansville.*

The Court begrudgingly concedes that interstate commerce may be made to "pay its way," *ante,* at 102 (internal quotation marks omitted), yet finds Oregon's nominal surcharge to exact more than a "'just share'" from interstate commerce, *ibid.* It escapes me how an additional $0.14 per week cost for the average solid waste producer constitutes anything but the type of "incidental effects on interstate commerce" endorsed by the majority. *Ante,* at 99. Evenhanded regulations imposing such incidental effects on interstate commerce must be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). If the majority finds $0.14 per week beyond the pale, one is left to wonder what the Court possibly could have contemplated when it stated:

> "'[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977), quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 767 (1945).

Surely $0.14 per week falls within even the most crabbed definition of "affect" or "regulate." Today the majority has rendered this "residuum of power" a nullity.

The State of Oregon is not prohibiting the export of solid waste from neighboring States; it is only asking that those neighbors pay their fair share for the use of Oregon landfill sites. I see nothing in the Commerce Clause that compels less densely populated States to serve as the low-cost dumping grounds for their neighbors, suffering the attendant risks that solid waste landfills present. The Court, deciding otherwise, further limits the dwindling options available to States as they contend with the environmental, health, safety, and political challenges posed by the problem of solid waste disposal in modern society.

For the foregoing reasons, I respectfully dissent.

TICOR TITLE INSURANCE CO. ET AL. *v.* BROWN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–1988. Argued March 1, 1994—Decided April 4, 1994

Respondents were members of a class whose money damages claims were settled in a suit filed against petitioner title insurance companies. The class was certified under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), which do not permit class members to opt out of a class. When respondent Brown subsequently filed the present action on behalf of Arizona and Wisconsin title insurance consumers, the District Court granted petitioners summary judgment on the ground that respondents were bound by the earlier judgment. The Ninth Circuit reversed, holding that it would violate due process to accord res judicata effect to a judgment involving money damages claims where a plaintiff to the previous suit had not been afforded a right to opt out.

Held: Because deciding this case would require the Court to resolve a constitutional question that may be entirely hypothetical, the writ is dismissed as improvidently granted. The Court would not have to reach the question whether absent class members have a constitutional right to opt out of actions involving money damages if it turned out that classes in such actions can be certified only under Rule 23(b)(3), which permits opt out. However, the determination that respondents' class fit within Rules 23(b)(1)(A) and (b)(2) is conclusive upon these parties, and the alternative of using the Federal Rules instead of the Constitution as a means of imposing an opt-out requirement on this settlement is no longer available. Further, it is not clear that our resolution of the constitutional question will make any difference even to these litigants.

Certiorari dismissed. Reported below: 982 F. 2d 386.

Richard G. Taranto argued the cause for petitioners. With him on the briefs were *Joel I. Klein, Frank D. Tatum, Jr., Paul J. Laveroni, John C. Christie, Jr., Patrick J. Roach, John F. Graybeal, Robert H. Tiller,* and *David M. Foster.*

Gerald D. W. North argued the cause for respondents. With him on the brief were *Ted M. Warshafsky, Aram A. Hartunian,* and *Ronald L. Futterman.**

PER CURIAM.

For the reasons discussed below, we have concluded that deciding this case would require us to resolve a constitutional question that may be entirely hypothetical, and we accordingly dismiss the writ as improvidently granted.

I

In 1985, the Federal Trade Commission initiated enforcement proceedings against petitioners, six title insurance companies, alleging that they conspired to fix prices in 13 States including Arizona and Wisconsin. Shortly after that, private parties in the affected States filed 12 different "tag-along" antitrust class actions, seeking treble damages and injunctive relief. Those private suits were consolidated for pretrial purposes pursuant to 28 U. S. C. § 1407 (the federal multidistrict litigation statute), and were transferred to the

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*Briefs of *amici curiae* urging reversal were filed for the American Insurance Association et al. by *Herbert M. Wachtell, Douglas S. Liebhafsky, Stuart Philip Ross, Sean M. Hanifin, Merril J. Hirsh, Craig A. Berrington, Paul J. Bschorr, Richard W. Reinthaler,* and *Rebecca L. Ford;* for the Lawyer's Committee for Civil Rights Under Law by *Michael A. Cooper, Herbert J. Hansell, Thomas J. Henderson, Richard T. Seymour, Sharon R. Vinick, Edward Labaton,* and *Bernard Persky;* and for the National Football League by *Frank Rothman, William L. Daly, Herbert Dym,* and *Gregg H. Levy.*

Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America by *Jeffrey Robert White, James E. Rooks, Jr.,* and *Barry J. Nace;* for Owens-Illinois, Inc., by *James Dabney Miller* and *David L. Gray;* for Public Citizen by *Alan B. Morrison* and *Brian Wolfman;* for Trial Lawyers for Public Justice by *Roberta B. Walburn, Arthur H. Bryant,* and *Leslie A. Brueckner;* for James Menendez et al. by *Brent M. Rosenthal;* and for Leslie O'Neal et al. by *Don Howarth* and *Suzelle M. Smith.*

District Court for the Eastern District of Pennsylvania as MDL No. 633.

In January 1986, spurred on by an intervening decision of this Court that substantially weakened the claims against petitioners, see *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U. S. 48 (1985), petitioners and the class representatives in MDL No. 633 reached a settlement. The settlement extinguished all money damages claims against petitioners by those " 'purchasers and insureds, who purchased or received title insurance . . . from any title insurance underwriter . . . with respect to real estate located in any of the thirteen Affected States during the period from January 1, 1981 to December 31, 1985,' " a class that included the respondents. *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986–1 Trade Cases ¶ 67,149, pp. 62,921, 62,924 (ED Pa. 1986) (quoting settlement agreement). To the plaintiffs, the settlement agreement awarded injunctive relief, an increased amount of coverage on any title insurance policy that class members bought during the class period, an increased amount of coverage on specified title insurance policies that class members might purchase from petitioners during a future 1-year period, and payment of attorney's fees and costs of the lawsuit. The District Court provisionally certified the settlement class (as stipulated by the class representatives and petitioners) under Federal Rules of Civil Procedure 23(b)(1) and (b)(2), and provisionally accepted the settlement.

At the ensuing final settlement hearing, the State of Wisconsin objected to the proposed settlement both as a class member and as *parens patriae* for its resident class members, claiming that the action could not be certified under Rule 23(b)(2) because the relief sought in the complaints was primarily monetary. Wisconsin also claimed (and was joined in this by the State of Arizona, both as a class member and as *parens patriae*) that due process required that the proposed class members have an opportunity to opt out of the class. The District Court ultimately rejected these objections, certified the classes under Rules 23(b)(1)(A) and (b)(2),* and accepted the settlement. The Third Circuit affirmed without opinion, *In re Real Estate Title and Settlement Services Antitrust Litigation,* 815 F. 2d 695 (1987) (judgment order), and we denied certiorari, 485 U. S. 909 (1988).

In 1990, respondent Brown filed the present action in District Court in Arizona on behalf of Arizona and Wisconsin title insurance consumers, alleging that petitioners had conspired to fix rates for title-search services in those States in violation of the federal antitrust laws. The District Court granted petitioners summary judgment on the ground, among others, that respondents, as parties to the MDL No. 633 suit, were bound by the judgment entered pursuant to the settlement. The Ninth Circuit reversed, accepting respondents' contention that it would violate due process to accord res judicata effect to a judgment in a class action that involved money damages claims (or perhaps that involved *primarily* money damages claims) against a plaintiff in the previous suit who had not been afforded a right to opt out on those claims. 982 F. 2d 386, 392 (1992). Before the Ninth Circuit, respondents did not (and indeed could not) challenge whether the class in the MDL No. 633 litigation was properly certified under Rules 23(b)(1)(A) and (b)(2). And in this Court, petitioners present only a single question—viz., "[w]hether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." Pet. for Cert. i.

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*Certification under Rule 23(b)(1)(A) requires that the prosecution of separate actions would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Certification under Rule 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

II

That certified question is of no general consequence if, whether or not absent class members have a constitutional right to opt out of such actions, they have a right to do so under the Federal Rules of Civil Procedure. Such a right would exist if, in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not. See Rules 23(c)(2) and (c)(3). That is at least a substantial possibility—and we would normally resolve that preliminary nonconstitutional question before proceeding to the constitutional claim. See *New York City Transit Authority* v. *Beazer*, 440 U. S. 568, 582–583 (1979). The law of res judicata, however, prevents that question from being litigated here. It was conclusively determined in the MDL No. 633 litigation that respondents' class fit within Rules 23(b)(1)(A) and (b)(2); even though that determination may have been wrong, it is conclusive upon these parties, and the alternative of using the Federal Rules instead of the Constitution as the means of imposing an opt-out requirement for this settlement is no longer available.

The most obvious consequence of this unavailability is, as we have suggested, that our resolution of the posited constitutional question may be quite unnecessary in law, and of virtually no practical consequence in fact, except with respect to these particular litigants. Another consequence, less apparent, is that resolving the constitutional question on the assumption of proper certification under the Rules may lead us to the wrong result. If the Federal Rules, which generally are not affirmatively enacted into law by Congress, see 28 U. S. C. §§ 2072(a), (b), 2074(a), are not entitled to that great deference as to constitutionality which we accord federal statutes, see, *e. g., Rostker* v. *Goldberg,* 453 U. S. 57, 64 (1981); *Walters* v. *National Assn. of Radiation Survivors,* 473 U. S. 305, 319–320 (1985), they at least come with the *imprimatur* of the rulemaking authority of this Court. In deciding the present case, we must assume either that the lack of opt-out opportunity in these circumstances was decreed by the Rules or that it was not (though the parties are bound by an erroneous holding that it was). If we make the former assumption we may approve, in the mistaken deference to prior Supreme Court action and congressional acquiescence, action that neither we nor Congress would independently think constitutional. If we make the latter assumption, we may announce a constitutional rule that is good for no other federal class action. Neither option is attractive.

The one reason to proceed is to achieve justice in this particular case. Even if the constitutional question presented is hypothetical as to everyone else, it would seem to be of great practical importance to these litigants. But that is ordinarily not sufficient reason for our granting certiorari—even when unnecessary constitutional pronouncements are not in the picture. Moreover, as matters have developed it is not clear that our resolution of the constitutional question will make any difference even to these litigants. On the day we granted certiorari we were informed that the parties had reached a settlement designed to moot the petition, which now awaits the approval of the District Court.

In these circumstances, we think it best to dismiss the writ as improvidently granted.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, dissenting.

We granted certiorari to consider one specific question: "Whether a federal court may refuse to enforce a prior federal class action judgment, properly certified under Rule 23, on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf." Pet. for Cert. i. The Court decides not to answer this question based on its speculation about a nonconstitutional ground for decision that is neither presented on this record nor available to these parties. From that decision I respectfully dissent.

Respondents are members of a class that reached a final settlement with petitioners in an antitrust action styled MDL No. 633. *In re Real Estate Title and Settlement Services Antitrust Litigation,* 1986–1 Trade Cases ¶ 67,149, p. 62,921 (ED Pa. 1986), aff'd, 815 F. 2d 695 (CA3 1987), cert. denied, 485 U. S. 909 (1988). Respondents subsequently brought this action against petitioners, asserting some of the same claims. The District Court held that respondents had been adequately represented in the MDL No. 633 action, and granted summary judgment for petitioners because, given the identity of parties and claims, the MDL No. 633 settlement was res judicata. App. to Pet. for Cert. 20a–28a. The Court of Appeals for the Ninth Circuit reversed. 982 F. 2d 386 (1992). The court agreed that respondents had been adequately represented in the MDL No. 633 action, *id.*, at 390–391, but held that respondents could nevertheless relitigate the same claims against petitioners: "Because [respondents] had no opportunity to opt out of the MDL No. 633 litigation, we hold there would be a violation of minimal due process if [respondents'] damage claims were held barred by *res judicata.*" *Id.*, at 392.

The Court concludes that the correctness of the Ninth Circuit's constitutional interpretation "is of no general consequence if, . . . in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not." *Ante,* at 121. In other words, the Court declines to answer the constitutional question because the MDL No. 633 action might not have been properly certified—an issue that was litigated to a final determination in petitioners' favor more than five years ago, and on which we denied certiorari. The nonconstitutional ground for decision about which the Court speculates is therefore unavailable to respondents. The constitutional ground on which the Court of Appeals relied, the one we granted certiorari to review and the parties have briefed and argued, was necessary to the decision in this case. Our prudential rule of avoiding constitutional questions has no application in these circumstances, and the Court errs in relying on it.

The Court's assertion that "our resolution of the posited constitutional question may be . . . of virtually no practical consequence in fact," *ibid.*, is unsound. The lower courts have consistently held that the presence of monetary damages claims does not preclude class certification under Rules 23(b)(1)(A) and (b)(2). See 7A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure, Civil 2d § 1775, pp. 463–470 (1986 and Supp. 1992). Whether or not those decisions are correct (a question we need not, and indeed should not, decide today), they at least indicate that there are a substantial number of class members in exactly the same position as respondents. Under the Ninth Circuit's rationale in this case, every one of them has the right to go into federal court and relitigate their claims against the defendants in the original action. The individuals, corporations, and governments that have successfully defended against class actions or reached appropriate settlements, but are now subject to relitigation of the same claims with individual class members, will rightly dispute the Court's characterization of the constitutional rule in this case as inconsequential.

The Court is likewise incorrect in suggesting that a decision in this case "may be quite unnecessary in law." *Ante*, at 121. Unless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and (b)(2) notwithstanding the presence of damages claims; the constitutional opt-out right announced by the court below will be implicated in every such action, at least in the Ninth Circuit. Moreover, because the decision below is based on the Due Process Clause, presumably it applies to the States; although we held in *Phillips Petroleum Co.* v. *Shutts*, 472 U. S. 797 (1985), that there is a constitutional right to opt out of class actions brought in state court, that holding was expressly "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." *Id.*, at 811, n. 3. The Ninth Circuit's rule, by contrast, applies whenever "substantial damage claims" are asserted. See 982 F. 2d, at 392. The resolution of a constitutional issue with such broad-ranging consequences is both necessary and appropriate.

Finally, I do not agree with the Court's suggestion that the posture of the case could "lead us to the wrong result" with respect to the question whether the Due Process Clause requires an opt-out right in federal class actions involving claims for money damages. See *ante*, at 121–122. As the case comes to us, we must assume that the MDL No. 633 class was properly certified under Rule 23, notwithstanding the presence of claims for monetary relief. But this assumption, coupled with whatever presumption of constitutionality to which the Rules are entitled, will not lead us to "approve . . . action that neither we nor Congress would independently think constitutional." *Ante*, at 122. Either an opt-out right is constitutionally required, or it is not. We can decide this issue while reserving the question of how the Rules should be construed. While it might be convenient, and it would certainly accord with our usual practice, to decide the nonconstitutional question first, that option is not available to us in this case. The only question, then, is whether we should dismiss the writ as improvidently granted. In my view, the importance of the constitutional question, as well as the significant expenditures of resources by the litigants, *amici*, and this Court, outweighs the prudential concerns on which the Court relies.

When a constitutional issue is fairly joined, necessary to the decision, and important enough to warrant review, this Court should not avoid resolving it—particularly on the basis of an entirely speculative alternative ground for decision that is neither presented by the record nor available to the parties before the Court. The decision below rests exclusively on a constitutional right to opt out of class actions asserting claims for monetary relief. We granted certiorari to consider whether such a right exists. The issue has been thoroughly briefed and argued by the parties. We should decide it.

J. E. B. *v.* ALABAMA EX REL. T. B.

CERTIORARI TO THE COURT OF CIVIL APPEALS OF ALABAMA

No. 92–1239. Argued November 2, 1993—Decided April 19, 1994

At petitioner's paternity and child support trial, respondent State used 9 of its 10 peremptory challenges to remove male jurors. The court empaneled an all-female jury after rejecting petitioner's claim that the logic and reasoning of *Batson* v. *Kentucky*, 476 U. S. 79—in which this Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits peremptory strikes based solely on race—extend to forbid gender-based peremptory challenges. The jury found petitioner to be the father of the child in question and the trial court ordered him to pay child support. The Alabama Court of Civil Appeals affirmed.

Held: The Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case solely because that person happens to be a woman or a man. Respondent's gender-based peremptory challenges cannot survive the heightened equal protection scrutiny that this Court affords distinctions based on gender. Respondent's rationale—that its decision to strike virtually all males in this case may reasonably have been based on the perception, supported by history, that men otherwise totally qualified to serve as jurors might be more sympathetic and receptive to the arguments of a man charged in a paternity action, while women equally qualified might be more sympathetic and receptive to the arguments of the child's mother—is virtually unsupported and is based on the very stereotypes the law condemns. The conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. So long as gender does not serve as a proxy for bias, unacceptable jurors may still be removed, including those who are members of a group or class that is normally subject to "rational basis" review and those who exhibit characteristics that are disproportionately associated with one gender. Pp. 131–146.

606 So. 2d 156, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 146. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 151. REHNQUIST, C. J., filed a dissenting opinion, *post*, p. 154. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 156.

John F. Porter III argued the cause and filed briefs for petitioner.

Michael R. Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Acting Assistant Attorneys General Keeney* and *Turner,* and *Deputy Solicitor General Bryson.*

Lois N. Brasfield, Assistant Attorney General of Alabama, argued the cause for respondent. With her on the briefs was *William F. Prendergast,* Assistant Attorney General.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In *Batson* v. *Kentucky,* 476 U. S. 79 (1986), this Court held that the Equal Protection Clause of the Fourteenth Amendment governs the exercise of peremptory challenges by a prosecutor in a criminal trial. The Court explained that although a defendant has "no right to a 'petit jury composed in whole or in part of persons of his own race,'" *id.,* at 85, quoting *Strauder* v. *West Virginia,* 100 U. S. 303, 305 (1880), the "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria," 476 U. S., at 85–86. Since *Batson,* we have reaffirmed repeatedly our commitment to jury selection procedures that are fair and nondiscriminatory. We have recognized that whether the trial is criminal or civil, potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes rooted in, and reflective of, historical prejudice. See *Powers* v. *Ohio,* 499 U. S. 400 (1991); *Edmonson* v. *Leesville Concrete Co.,* 500 U. S. 614 (1991); *Georgia* v. *McCollum,* 505 U. S. 42 (1992).

Although premised on equal protection principles that apply equally to gender discrimination, all our recent cases defining the scope of *Batson* involved alleged racial discrimination in the exercise of peremptory challenges. Today we are faced with the question whether the Equal Protection Clause forbids intentional discrimination on the basis of gender, just as it prohibits discrimination on the basis of race. We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.

**David H. Coburn, Stephanie A. Philips,* and *Marcia Greenberger* filed a brief for the National Women's Law Center et al. as *amici curiae* urging reversal.

I

On behalf of relator T. B., the mother of a minor child, respondent State of Alabama filed a complaint for paternity and child support against petitioner J. E. B. in the District Court of Jackson County, Alabama. On October 21, 1991, the matter was called for trial and jury selection began. The trial court assembled a panel of 36 potential jurors, 12 males and 24 females. After the court excused three jurors for cause, only 10 of the remaining 33 jurors were male. The State then used 9 of its 10 peremptory strikes to remove male jurors; petitioner used all but one of his strikes to remove female jurors. As a result, all the selected jurors were female.

Before the jury was empaneled, petitioner objected to the State's peremptory challenges on the ground that they were exercised against male jurors solely on the basis of gender, in violation of the Equal Protection Clause of the Fourteenth Amendment. App. 22. Petitioner argued that the logic and reasoning of *Batson* v. *Kentucky,* which prohibits peremptory strikes solely on the basis of race, similarly forbids intentional discrimination on the basis of gender. The court rejected petitioner's claim and empaneled the all-female jury. App. 23. The jury found petitioner to be the father of the child, and the court entered an order directing him to pay child support. On postjudgment motion, the court reaffirmed its ruling that *Batson* does not extend to gender-based peremptory challenges. App. 33. The Alabama Court of Civil Appeals affirmed, 606 So. 2d 156 (1992), relying on Alabama precedent, see, *e. g., Murphy* v. *State,* 596 So. 2d 42 (Ala. Crim. App. 1991), cert. denied, 506 U. S. 827 (1992), and *Ex parte Murphy,* 596 So. 2d 45 (Ala. 1992). The Supreme Court of Alabama denied certiorari, No. 1911717 (Oct. 23, 1992).

We granted certiorari, 508 U. S. 905 (1993), to resolve a question that has created a conflict of authority—whether the Equal Protection Clause forbids peremptory challenges on the basis of gender as well as on the basis of race.[1] Today we reaffirm what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

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[1] The Federal Courts of Appeals have divided on the issue. See *United States* v. *De Gross,* 913 F. 2d 1417 (CA9 1990), and 960 F. 2d 1433, 1437–1443 (1992) (en banc) (extending *Batson* v. *Kentucky,* 476 U. S. 79 (1986), to prohibit gender-based peremptory challenges in both criminal and civil trials); cf. *United States* v. *Nichols,* 937 F. 2d 1257, 1262–1264 (CA7 1991) (declining to extend *Batson* to gender), cert. denied, 502 U. S. 1080 (1992); *United States* v. *Hamilton,* 850 F. 2d 1038, 1042–1043 (CA4 1988) (same), cert. dism'd, 489 U. S. 1094 (1989), and cert. denied, 493 U. S. 1069 (1990); *United States* v. *Broussard,* 987 F. 2d 215, 218–220 (CA5 1993) (same).

State courts also have considered the constitutionality of gender-based peremptory challenges. See *Laidler* v. *State,* 627 So. 2d 1263 (Fla. App. 1993) (extending *Batson* to gender); *State* v. *Burch,* 65 Wash. App. 828, 830 P. 2d 357 (1992) (same, relying on State and Federal Constitutions); *Di Donato* v. *Santini,* 232 Cal. App. 3d 721, 283 Cal. Rptr. 751 (1991), review denied (Cal., Oct. 2, 1991); *Tyler* v. *State,* 330 Md. 261, 623 A. 2d 648 (1993) (relying on State Constitution); *People* v. *Mitchell,* 228 Ill. App. 3d 917, 593 N. E. 2d 882 (1992) (same), aff'd in part and vacated in relevant part, 155 Ill. 2d 643, 602 N. E. 2d 467 (1993); *State* v. *Gonzales,* 111 N. M. 590, 808 P. 2d 40 (App.) (same), cert. denied, 111 N. M. 590, 806 P. 2d 65 (1991); *State* v. *Levinson,* 71 Haw. 492, 498–499, 795 P. 2d 845, 849 (1990) (same); *People* v. *Irizarry,* 165 App. Div. 2d 715, 560 N. Y. S. 2d 279 (1990) (same); *Commonwealth* v. *Hutchinson,* 395 Mass. 568, 570, 481 N. E. 2d 188, 190 (1985) (same); cf. *State* v. *Culver,* 293 Neb. 228, 444 N. W. 2d 662 (1989) (refusing to extend *Batson* to gender); *State* v. *Clay,* 779 S. W. 2d 673, 676 (Mo. App. 1989) (same); *State* v. *Adams,* 533 So. 2d 1060, 1063 (La. App. 1988) (same), cert. denied, 540 So. 2d 338 (La. 1989); *State* v. *Oliviera,* 534 A. 2d 867, 870 (R. I. 1987) (same); *Murphy* v. *State,* 596 So. 2d 42 (Ala. Crim. App. 1991) (same), cert. denied, 596 So. 2d 45 (Ala.), cert. denied, 506 U. S. 827 (1992).

II

Discrimination on the basis of gender in the exercise of peremptory challenges is a relatively recent phenomenon. Gender-based peremptory strikes were hardly practicable during most of our country's existence, since, until the 20th century, women were completely excluded from jury service.[2] So well entrenched was this exclusion of women that in 1880 this Court, while finding that the exclusion of African-American men from juries violated the Fourteenth Amendment, expressed no doubt that a State "may confine the selection [of jurors] to males." *Strauder* v. *West Virginia,* 100 U. S., at 310; see also *Fay* v. *New York,* 332 U. S. 261, 289–290 (1947).

Many States continued to exclude women from jury service well into the present century, despite the fact that women attained suffrage upon ratification of the Nineteenth Amendment in 1920.[3] States that did permit women to serve on juries often erected other barriers, such as registration requirements and automatic exemptions, designed to deter women from exercising their right to jury service. See, *e. g.,*

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[2] There was one brief exception. Between 1870 and 1871, women were permitted to serve on juries in Wyoming Territory. They were no longer allowed on juries after a new chief justice who disfavored the practice was appointed in 1871. See Abrahamson, Justice and Juror, 20 Ga. L. Rev. 257, 263–264 (1986).

[3] In 1947, women still had not been granted the right to serve on juries in 16 States. See Rudolph, Women on Juries—Voluntary or Compulsory?, 44 J. Am. Jud. Soc. 206 (1961). As late as 1961, three States, Alabama, Mississippi, and South Carolina, continued to exclude women from jury service. See *Hoyt* v. *Florida,* 368 U. S. 57, 62 (1961). Indeed, Alabama did not recognize women as a "cognizable group" for jury-service purposes until after the 1966 decision in *White* v. *Crook,* 251 F. Supp. 401 (MD Ala.) (three-judge court).

Fay v. *New York*, 332 U. S., at 289 ("[I]n 15 of the 28 states which permitted women to serve [on juries in 1942], they might claim exemption because of their sex"); *Hoyt* v. *Florida*, 368 U. S. 57 (1961) (upholding affirmative registration statute that exempted women from mandatory jury service).

The prohibition of women on juries was derived from the English common law which, according to Blackstone, rightfully excluded women from juries under "the doctrine of *propter defectum sexus*, literally, the 'defect of sex.'" *United States* v. *De Gross*, 960 F. 2d 1433, 1438 (CA9 1992) (en banc), quoting 2 W. Blackstone, Commentaries *362.[4] In this country, supporters of the exclusion of women from juries tended to couch their objections in terms of the ostensible need to protect women from the ugliness and depravity of trials. Women were thought to be too fragile and virginal to withstand the polluted courtroom atmosphere. See *Bailey* v. *State*, 215 Ark. 53, 61, 219 S. W. 2d 424, 428 (1949) ("Criminal court trials often involve testimony of the foulest kind, and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships, and other elements that would prove humiliating, embarrassing and degrading to a lady"); *In re Goodell*, 39 Wis. 232, 245–246 (1875) (endorsing statutory ineligibility of women for admission to the bar because "[r]everence for all womanhood would suffer in the public spectacle of women . . . so engaged"); *Bradwell* v. *State*, 16 Wall. 130, 141 (1873) (concurring opinion) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator"). Cf. *Frontiero* v. *Richardson*, 411 U. S. 677, 684 (1973) (plurality opinion) (This "attitude of 'romantic paternalism' . . . put women, not on a pedestal, but in a cage").

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[4] In England there was at least one deviation from the general rule that only males could serve as jurors. If a woman was subject to capital punishment, or if a widow sought postponement of the disposition of her husband's estate until birth of a child, a *writ de ventre inspiciendo* permitted the use of a jury of matrons to examine the woman to determine whether she was pregnant. But even when a jury of matrons was used, the examination took place in the presence of 12 men, who also composed part of the jury in such cases. The jury of matrons was used in the United States during the Colonial period, but apparently fell into disuse when the medical profession began to perform that function. See Note, Jury Service for Women, 12 U. Fla. L. Rev. 224, 224–225 (1959).

This Court in *Ballard* v. *United States*, 329 U. S. 187 (1946), first questioned the fundamental fairness of denying women the right to serve on juries. Relying on its supervisory powers over the federal courts, it held that women may not be excluded from the venire in federal trials in States where women were eligible for jury service under local law. In response to the argument that women have no superior or unique perspective, such that defendants are denied a fair trial by virtue of their exclusion from jury panels, the Court explained:

> "It is said . . . that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act like a class. . . . The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on

> the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded." *Id.*, at 193–194 (footnotes omitted).

Fifteen years later, however, the Court still was unwilling to translate its appreciation for the value of women's contribution to civic life into an enforceable right to equal treatment under state laws governing jury service. In *Hoyt* v. *Florida*, 368 U. S., at 61, the Court found it reasonable, "[d]espite the enlightened emancipation of women," to exempt women from mandatory jury service by statute, allowing women to serve on juries only if they volunteered to serve. The Court justified the differential exemption policy on the ground that women, unlike men, occupied a unique position "as the center of home and family life." *Id.*, at 62.

In 1975, the Court finally repudiated the reasoning of *Hoyt* and struck down, under the Sixth Amendment, an affirmative registration statute nearly identical to the one at issue in *Hoyt*. See *Taylor* v. *Louisiana*, 419 U. S. 522 (1975).[5] We explained: "Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." *Id.*, at 530. The diverse and representative character of the jury must be maintained "'partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.'" *Id.*, at 530–531, quoting *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 227 (1946) (Frankfurter,

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[5] *Taylor* distinguished *Hoyt* by explaining that that case "did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community," 419 U. S., at 534. The Court now, however, has stated that *Taylor* "in effect" overruled *Hoyt*. See *Payne* v. *Tennessee*, 501 U. S. 808, 828, n. 1 (1991).

J., dissenting). See also *Duren* v. *Missouri*, 439 U. S. 357 (1979).

III

Taylor relied on Sixth Amendment principles, but the opinion's approach is consistent with the heightened equal protection scrutiny afforded gender-based classifications. Since *Reed* v. *Reed*, 404 U. S. 71 (1971), this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of "archaic and overbroad" generalizations about gender, see *Schlesinger* v. *Ballard*, 419 U. S. 498, 506–507 (1975), or based on "outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'" *Craig* v. *Boren*, 429 U. S. 190, 198–199 (1976). See also *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S. 432, 441 (1985) (differential treatment of the sexes "very likely reflect[s] outmoded notions of the relative capabilities of men and women").

Despite the heightened scrutiny afforded distinctions based on gender, respondent argues that gender discrimination in the selection of the petit jury should be permitted, though discrimination on the basis of race is not. Respondent suggests that "gender discrimination in this country . . . has never reached the level of discrimination" against African-Americans, and therefore gender discrimination, unlike racial discrimination, is tolerable in the courtroom. Brief for Respondent 9.

While the prejudicial attitudes toward women in this country have not been identical to those held toward racial minorities, the similarities between the experiences of racial minorities and women, in some contexts, "overpower those differences." Note, Beyond *Batson:* Eliminating Gender-Based Peremptory Challenges, 105 Harv. L. Rev. 1920, 1921

(1992). As a plurality of this Court observed in *Frontiero* v. *Richardson,* 411 U. S., at 685:

> "[T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservative of other basic civil and political rights'—until adoption of the Nineteenth Amendment half a century later." (Footnote omitted.)

Certainly, with respect to jury service, African-Americans and women share a history of total exclusion, a history which came to an end for women many years after the embarrassing chapter in our history came to an end for African-Americans.

We need not determine, however, whether women or racial minorities have suffered more at the hands of discriminatory state actors during the decades of our Nation's history. It is necessary only to acknowledge that "our Nation has had a long and unfortunate history of sex discrimination," *id.*, at 684, a history which warrants the heightened scrutiny we afford all gender-based classifications today. Under our equal protection jurisprudence, gender-based classifications require "an exceedingly persuasive justification" in order to survive constitutional scrutiny. See *Personnel Administrator of Mass.* v. *Feeney,* 442 U. S. 256, 273 (1979). See also *Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 724 (1982); *Kirchberg* v. *Feenstra,* 450 U. S. 455, 461 (1981). Thus, the only question is whether discrimination on the basis of gender in jury selection substantially furthers the State's legitimate interest in achieving a fair and impartial trial.[6] In making this assessment, we do not weigh the value of peremptory challenges as an institution against our asserted commitment to eradicate invidious discrimination from the courtroom.[7] Instead, we consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.[8]

Far from proffering an exceptionally persuasive justification for its gender-based peremptory challenges, respondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child." Brief for Respondent 10.[9]

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[6] Because we conclude that gender-based peremptory challenges are not substantially related to an important government objective, we once again need not decide whether classifications based on gender are inherently suspect. See *Mississippi Univ. for Women*, 458 U. S., at 724, n. 9; *Stanton* v. *Stanton*, 421 U. S. 7, 13 (1975); *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 26, n. (1993) (GINSBURG, J., concurring) ("[I]t remains an open question whether 'classifications based on gender are inherently suspect' ") (citations omitted).

[7] Although peremptory challenges are valuable tools in jury trials, they "are not constitutionally protected fundamental rights; rather they are but one state-created means to the constitutional end of an impartial jury and a fair trial." *Georgia* v. *McCollum*, 505 U. S. 42, 57 (1992).

[8] Respondent argues that we should recognize a special state interest in this case: the State's interest in establishing the paternity of a child born out of wedlock. Respondent contends that this interest justifies the use of gender-based peremptory challenges, since illegitimate children are themselves victims of historical discrimination and entitled to heightened scrutiny under the Equal Protection Clause.

What respondent fails to recognize is that the only legitimate interest it could possibly have in the exercise of its peremptory challenges is securing a fair and impartial jury. See *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 620 (1991) ("[The] sole purpose [of the peremptory challenge] is to permit litigants to assist the government in the selection of an impartial trier of fact"). This interest does not change with the parties or the causes. The State's interest in *every* trial is to see that the proceedings are carried out in a fair, impartial, and nondiscriminatory manner.

We shall not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns." *Powers* v. *Ohio*, 499 U. S., at 410. Respondent's rationale, not unlike those regularly expressed for gender-based strikes, is reminiscent of the arguments advanced to justify the total exclusion of women from juries.[10] Respondent of-

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[9] Respondent cites one study in support of its quasi-empirical claim that women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140 (1983). The authors conclude: "Neither student nor citizen judgments for typical criminal case materials have revealed differences between male and female verdict preferences. . . . The picture differs [only] for rape cases, where female jurors appear to be somewhat more conviction-prone than male jurors." The majority of studies suggest that gender plays no identifiable role in jurors' attitudes. See, *e. g.*, V. Hans & N. Vidmar, Judging the Jury 76 (1986) ("[I]n the majority of studies there are no significant differences in the way men and women perceive and react to trials; yet a few studies find women more defense-oriented, while still others show women more favorable to the prosecutor"). Even in 1956, before women had a constitutional right to serve on juries, some commentators warned against using gender as a proxy for bias. See F. Busch, Law and Tactics in Jury Trials § 143, p. 207 (1949) ("In this age of general and specialized education, availed of generally by both men and women, it would appear unsound to base a peremptory challenge in any case upon the sole ground of sex . . .").

[10] A manual formerly used to instruct prosecutors in Dallas, Texas, provided the following advice: "'I don't like women jurors because I can't trust them. They do, however, make the best jurors in cases involving crimes against children. It is possible that their "women's intuition" can help you if you can't win your case with the facts.'" Alschuler, The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts, 56 U. Chi. L. Rev. 153, 210 (1989). Another widely circulated trial manual speculated:

"If counsel is depending upon a clearly applicable rule of law and if he wants to avoid a verdict of 'intuition' or 'sympathy,' if his verdict in fers virtually no support for the conclusion that gender alone is an accurate predictor of juror's attitudes; yet it urges this Court to condone the same stereotypes that justified the wholesale exclusion of women from juries and the ballot box.[11] Respondent seems to assume that gross generalizations that would be deemed impermissible if made on the

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amount is to be proved by clearly demonstrated blackboard figures for example, generally he would want a male juror.

. . . . .

"[But] women . . . are desired jurors when plaintiff is a man. A woman juror may see a man impeached from the beginning of the case to the end, but there is at least the chance [with] the woman juror (particularly if the man happens to be handsome or appealing) [that] the plaintiff's derelictions in and out of court will be overlooked. A woman is inclined to forgive sin in the opposite sex; but definitely not her own." 3 M. Belli, Modern Trials §§ 51.67 and 51.68, pp. 446–447 (2d ed. 1982).

[11] Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based peremptory challenges, that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization. See, *e. g., Weinberger* v. *Wiesenfeld,* 420 U. S. 636, 645 (1975) (holding unconstitutional a Social Security Act classification authorizing benefits to widows but not to widowers despite the fact that the justification for the differential treatment was "not entirely without empirical support"); *Craig* v. *Boren,* 429 U. S. 190, 201 (1976) (invalidating an Oklahoma law that established different drinking ages for men and women, although the evidence supporting the age differential was "not trivial in a statistical sense"). The generalization advanced by Alabama in support of its asserted right to discriminate on the basis of gender is, at the least, overbroad, and serves only to perpetuate the same "outmoded notions of the relative capabilities of men and women," *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U. S. 432, 441 (1985), that we have invalidated in other contexts. See *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Stanton* v. *Stanton, supra; Craig* v. *Boren, supra; Mississippi Univ. for Women* v. *Hogan, supra.* The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.

basis of race are somehow permissible when made on the basis of gender.

Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. See *Edmonson,* 500 U. S., at 628 (discrimination in the courtroom "raises serious questions as to the fairness of the proceedings conducted there"). The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

When state actors exercise peremptory challenges in reliance on gender stereotypes, they ratify and reinforce prejudicial views of the relative abilities of men and women. Because these stereotypes have wreaked injustice in so many other spheres of our country's public life, active discrimination by litigants on the basis of gender during jury selection "invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." *Powers* v. *Ohio,* 499 U. S., at 412. The potential for cynicism is particularly acute in cases where gender-related issues are prominent, such as cases involving rape, sexual harassment, or paternity. Discriminatory use of peremptory challenges may create the impression that the judicial system has acquiesced in suppressing full participation by one gender or that the "deck has been stacked" in favor of one side. See *id.,* at 413 ("The verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means at the outset").

In recent cases we have emphasized that individual jurors themselves have a right to nondiscriminatory jury selection procedures.[12] See *Powers, supra, Edmonson, supra,* and *Georgia* v. *McCollum,* 505 U. S. 42 (1992). Contrary to respondent's suggestion, this right extends to both men and women. See *Mississippi Univ. for Women* v. *Hogan,* 458 U. S, at 723 (that a state practice "discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review"); cf. Brief for Respondent 9 (arguing that men deserve no protection from gender discrimination in jury selection because they are not victims of historical discrimination). All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination.[13] Striking individual jurors on the assumption that they hold particular views simply because of their gender is "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder* v. *West Virginia*, 100 U. S., at 308. It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation.[14] The message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree.[15]

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[12] Given our recent precedent, the doctrinal basis for JUSTICE SCALIA's dissenting opinion is a mystery. JUSTICE SCALIA points out that the discrimination at issue in this case was directed at men, rather than women, but then acknowledges that the Equal Protection Clause protects both men and women from intentional discrimination on the basis of gender. See *post,* at 157, citing *Mississippi Univ. for Women* v. *Hogan,* 458 U. S., at 723–724. He also appears cognizant of the fact that classifications based on gender must be more than merely rational, see *post,* at 160–161; they must be supported by an "exceedingly persuasive justification," *Hogan,* 458 U. S., at 724. JUSTICE SCALIA further admits that the Equal Protection Clause, as interpreted by decisions of this Court, governs the exercise of peremptory challenges in every trial, and that potential jurors, as well as litigants, have an equal protection right to nondiscriminatory jury selection procedures. See *post,* at 158–160, citing *Batson, Powers, Edmonson,* and *McCollum.* JUSTICE SCALIA does not suggest that we overrule these cases, nor does he attempt to distinguish them. He intimates that discrimination on the basis of gender in jury selection may be rational, see *post,* at 157, but offers no "exceedingly persuasive justification" for it. Indeed, JUSTICE SCALIA fails to advance *any* justification for his apparent belief that the Equal Protection Clause, while prohibiting discrimination on the basis of race in the exercise of peremptory challenges, allows discrimination on the basis of gender. His dissenting opinion thus serves as a tacit admission that, short of overruling a decade of cases interpreting the Equal Protection Clause, the result we reach today is doctrinally compelled.

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[13] It is irrelevant that women, unlike African-Americans, are not a numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. Cf. *United States* v. *Broussard*, 987 F. 2d, at 220 (declining to extend *Batson* to gender; noting that "[w]omen are not a numerical minority," and therefore are likely to be represented on juries despite the discriminatory use of peremptory challenges). Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system.

[14] The popular refrain is that *all* peremptory challenges are based on stereotypes of some kind, expressing various intuitive and frequently erroneous biases. See *post*, at 161. But where peremptory challenges are made on the basis of group characteristics other than race or gender (like occupation, for example), they do not reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life. See Babcock, A Place in the Palladium, Women's Rights and Jury Service, 61 U. Cinn. L. Rev. 1139, 1173 (1993).

[15] JUSTICE SCALIA argues that there is no "discrimination and dishonor" in being subject to a race- or gender-based peremptory strike. *Post*, at 160. JUSTICE SCALIA's argument has been rejected many times, see, *e. g.*, *Powers* v. *Ohio*, 499 U. S. 400, 410 (1991), and we reject it once again. The only support JUSTICE SCALIA offers for his conclusion is the fact that race- and gender-based peremptory challenges have a long history in this coun-

IV

Our conclusion that litigants may not strike potential jurors solely on the basis of gender does not imply the elimination of all peremptory challenges. Neither does it conflict with a State's legitimate interest in using such challenges in its effort to secure a fair and impartial jury. Parties still may remove jurors who they feel might be less acceptable than others on the panel; gender simply may not serve as a proxy for bias. Parties may also exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to "rational basis" review. See *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U. S., at 439–442; *Clark* v. *Jeter*, 486 U. S. 456, 461 (1988). Even strikes based on characteristics that are disproportionately associated with one gender could be appropriate, absent a showing of pretext.[16]

If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the

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try. *Post*, at 159 (discriminatory peremptory challenges have "coexisted with the Equal Protection Clause for 120 years"); *post*, at 160 (there was a "106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, *[Strauder]*, and our holding that peremptory challenges on the basis of race were unconstitutional, *[Batson]*"). We do not dispute that this Court long has tolerated the discriminatory use of peremptory challenges, but this is not a reason to continue to do so. Many of "our people's traditions," see *post*, at 163, such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once coexisted with the Equal Protection Clause.

[16] For example, challenging all persons who have had military experience would disproportionately affect men at this time, while challenging all persons employed as nurses would disproportionately affect women. Without a showing of pretext, however, these challenges may well not be unconstitutional, since they are not gender or race based. See *Hernandez* v. *New York*, 500 U. S. 352 (1991).

parties may exercise their peremptory challenges intelligently. See, *e. g., Nebraska Press Assn.* v. *Stuart,* 427 U. S. 539, 602 (1976) (Brennan, J., concurring in judgment) (*voir dire* "facilitate[s] intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause"); *United States* v. *Witt,* 718 F. 2d 1494, 1497 (CA10 1983) ("Without an adequate foundation [laid by *voir dire*], counsel cannot exercise sensitive and intelligent peremptory challenges").

The experience in the many jurisdictions that have barred gender-based challenges belies the claim that litigants and trial courts are incapable of complying with a rule barring strikes based on gender. See n. 1, *supra* (citing state and federal jurisdictions that have extended *Batson* to gender).[17] As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike. *Batson,* 476 U. S., at 97. When an explanation is required, it need not rise to the level of a "for cause" challenge; rather, it merely must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual. See *Hernandez* v. *New York,* 500 U. S. 352 (1991).

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[17] Respondent argues that Alabama's method of jury selection would make the extension of *Batson* to gender particularly burdensome. In Alabama, the "struck-jury" system is employed, a system which requires litigants to strike alternately until 12 persons remain, who then constitute the jury. See Ala. Rule Civ. Proc. 47 (1990). Respondent suggests that, in some cases at least, it is necessary under this system to continue striking persons from the venire after the litigants no longer have an articulable reason for doing so. As a result, respondent contends, some litigants may be unable to come up with gender-neutral explanations for their strikes.

We find it worthy of note that Alabama has managed to maintain its struck-jury system even after the ruling in *Batson,* despite the fact that there are counties in Alabama that are predominately African-American. In those counties, it presumably would be as difficult to come up with race-neutral explanations for peremptory strikes as it would be to advance gender-neutral explanations. No doubt the *voir dire* process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges. The same should be true for gender. Regardless, a State's choice of jury-selection methods cannot insulate it from the strictures of the Equal Protection Clause. Alabama is free to adopt whatever jury-selection procedures it chooses so long as they do not violate the Constitution.

Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination.[18] Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

V

Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system.[19] It not

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[18] The temptation to use gender as a pretext for racial discrimination may explain why the majority of the lower court decisions extending *Batson* to gender involve the use of peremptory challenges to remove minority women. All four of the gender-based peremptory cases to reach the Federal Courts of Appeals and cited in n. 1, *supra,* involved the striking of minority women.

[19] This Court almost a half century ago stated:

"The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of only furthers the goals of the jury system. It reaffirms the promise of equality under the law—that all citizens, regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. *Powers* v. *Ohio,* 499 U. S., at 407 ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process"). When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.

In view of these concerns, the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man. As with race, the "core guarantee of equal protection, ensuring citizens that their State will not discriminate . . . , would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' [gender]." *Batson,* 476 U. S., at 97–98.

The judgment of the Court of Civil Appeals of Alabama is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I agree with the Court that the Equal Protection Clause prohibits the government from excluding a person from jury service on account of that person's gender. *Ante,* at 135–137. The State's proffered justifications for its gender-based peremptory challenges are far from the " 'exceedingly persuasive' " showing required to sustain a gender-based

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the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, 220 (1946).

classification. *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 724 (1982); *ante*, at 137–140. I therefore join the Court's opinion in this case. But today's important blow against gender discrimination is not costless. I write separately to discuss some of these costs, and to express my belief that today's holding should be limited to the *government's* use of gender-based peremptory strikes.

Batson v. *Kentucky*, 476 U. S. 79 (1986), itself was a significant intrusion into the jury selection process. *Batson* minihearings are now routine in state and federal trial courts, and *Batson* appeals have proliferated as well. Demographics indicate that today's holding may have an even greater impact than did *Batson* itself. In further constitutionalizing jury selection procedures, the Court increases the number of cases in which jury selection—once a sideshow—will become part of the main event.

For this same reason, today's decision further erodes the role of the peremptory challenge. The peremptory challenge is "a practice of ancient origin" and is "part of our common law heritage." *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 639 (1991) (O'CONNOR, J., dissenting). The principal value of the peremptory is that it helps produce fair and impartial juries. *Swain* v. *Alabama*, 380 U. S. 202, 218–219 (1965); Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 549–558 (1975). "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury." *Holland* v. *Illinois*, 493 U. S. 474, 484 (1990) (emphasis deleted; internal quotation marks and citations omitted). The peremptory's importance is confirmed by its persistence: It was well established at the time of Blackstone and continues to endure in all the States. *Id.*, at 481.

Moreover, "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain,* 380 U. S., at 220. Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's "'bare looks and gestures.'" *Ibid.* That a trial lawyer's instinctive assessment of a juror's predisposition cannot meet the high standards of a challenge for cause does not mean that the lawyer's instinct is erroneous. Cf. V. Starr & M. McCormick, Jury Selection 522 (1993) (nonverbal cues can be better than verbal responses at revealing a juror's disposition). Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge. But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable.

In so doing we make the peremptory challenge less discretionary and more like a challenge for cause. We also increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic. Similarly, in jurisdictions where lawyers exercise their strikes in open court, lawyers may be deterred from using their peremptories, out of the fear that if they are unable to justify the strike the court will seat a juror who knows that the striking party thought him unfit. Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.

Nor is the value of the peremptory challenge to the litigant diminished when the peremptory is exercised in a gender-based manner. We know that like race, gender matters. A plethora of studies make clear that in rape cases, for example, female jurors are somewhat more likely to vote to convict than male jurors. See R. Hastie, S. Penrod, & N. Pennington, Inside the Jury 140–141 (1983) (collecting and summarizing empirical studies). Moreover, though there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case. "'Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them.'" *Beck* v. *Alabama*, 447 U. S. 625, 642 (1980). Individuals are not expected to ignore as jurors what they know as men—or women.

Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. I previously have said with regard to *Batson:* "That the Court will not tolerate prosecutors' racially discriminatory use of the peremptory challenge, in effect, is a special rule of relevance, a statement about what this Nation stands for, rather than a statement of fact." *Brown* v. *North Carolina*, 479 U. S. 940, 941–942 (1986) (opinion concurring in denial of certiorari). Today's decision is a statement that, in an effort to eliminate the potential discriminatory use of the peremptory, see *Batson*, 476 U. S., at 102 (Marshall, J., concurring), gender is now governed by the special rule of relevance formerly reserved for race. Though we gain much from this statement, we cannot ignore what we lose. In extending *Batson* to gender we have added an additional burden to the state and federal trial process, taken a step closer to eliminating the peremptory challenge, and diminished the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes.

These concerns reinforce my conviction that today's decision should be limited to a prohibition on the government's use of gender-based peremptory challenges. The Equal Protection Clause prohibits only discrimination by state actors. In *Edmonson, supra,* we made the mistake of concluding that private civil litigants were state actors when they exercised peremptory challenges; in *Georgia* v. *McCollum,* 505 U. S. 42, 50–55 (1992), we compounded the mistake by holding that criminal defendants were also state actors. Our commitment to eliminating discrimination from the legal process should not allow us to forget that not all that occurs in the courtroom is state action. Private civil litigants are just that—*private* litigants. "The government erects the platform; it does not thereby become responsible for all that occurs upon it." *Edmonson,* 500 U. S., at 632 (O'CONNOR, J., dissenting).

Clearly, criminal defendants are not state actors. "From arrest, to trial, to possible sentencing and punishment, the antagonistic relationship between government and the accused is clear for all to see. . . . [T]he unique relationship between criminal defendants and the State precludes attributing defendants' actions to the State . . . ." *McCollum, supra,* at 67 (O'CONNOR, J., dissenting). The peremptory challenge is " 'one of the most important of the rights secured to the *accused.*' " *Swain,* 380 U. S., at 219 (emphasis added); Goldwasser, Limiting a Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial, 102 Harv. L. Rev. 808, 826–833 (1989). Limiting the accused's use of the peremptory is "a serious misordering of our priorities," for it means "we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *McCollum, supra,* at 61–62 (THOMAS, J., concurring in judgment).

Accordingly, I adhere to my position that the Equal Protection Clause does not limit the exercise of peremptory challenges by private civil litigants and criminal defendants. This case itself presents no state action dilemma, for here the State of Alabama itself filed the paternity suit on behalf of petitioner. But what of the next case? Will we, in the name of fighting gender discrimination, hold that the battered wife—on trial for wounding her abusive husband—is a state actor? Will we preclude her from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible? I assume we will, but I hope we will not.

JUSTICE KENNEDY, concurring in the judgment.

I am in full agreement with the Court that the Equal Protection Clause prohibits gender discrimination in the exercise of peremptory challenges. I write to explain my understanding of why our precedents lead to that conclusion.

Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against "persons because of race, color or previous condition of servitude," the Amendment submitted for consideration and later ratified contained more comprehensive terms: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." See *Oregon* v. *Mitchell*, 400 U. S. 112, 172–173 (1970) (Harlan, J., concurring in part and dissenting in part); B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867, pp. 90–91, 97–100 (1914). In recognition of the evident historical fact that the Equal Protection Clause was adopted to prohibit government discrimination on the basis of race, the Court most often interpreted it in the decades that followed in accord with that purpose. In *Strauder* v. *West Virginia*, 100 U. S. 303 (1880), for example, the Court invalidated a West Virginia law prohibiting blacks from serving on juries. In so doing, the decision said of the Equal Protection Clause:

"What is this but declaring that the law in the States shall be the same for the black as for the white." *Id.,* at 307. And while the Court held that the State could not confine jury service to whites, it further noted that the State could confine jury service "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." *Id.,* at 310. See also *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373–374 (1886).

As illustrated by the necessity for the Nineteenth Amendment in 1920, much time passed before the Equal Protection Clause was thought to reach beyond the purpose of prohibiting racial discrimination and to apply as well to discrimination based on sex. In over 20 cases beginning in 1971, however, we have subjected government classifications based on sex to heightened scrutiny. Neither the State nor any Member of the Court questions that principle here. And though the intermediate scrutiny test we have applied may not provide a very clear standard in all instances, see *Craig* v. *Boren,* 429 U. S. 190, 221 (1976) (REHNQUIST, J., dissenting), our case law does reveal a strong presumption that gender classifications are invalid. See, *e. g., Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718 (1982).

There is no doubt under our precedents, therefore, that the Equal Protection Clause prohibits sex discrimination in the selection of jurors. *Duren* v. *Missouri,* 439 U. S. 357 (1979); *Taylor* v. *Louisiana,* 419 U. S. 522 (1975). The only question is whether the Clause also prohibits peremptory challenges based on sex. The Court is correct to hold that it does. The Equal Protection Clause and our constitutional tradition are based on the theory that an individual possesses rights that are protected against lawless action by the government. The neutral phrasing of the Equal Protection Clause, extending its guarantee to "any person," reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question). "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class." *Metro Broadcasting, Inc.* v. *FCC*, 497 U. S. 547, 602 (1990) (O'CONNOR, J., dissenting) (emphasis deleted; internal quotation marks omitted). For purposes of the Equal Protection Clause, an individual denied jury service because of a peremptory challenge exercised against her on account of her sex is no less injured than the individual denied jury service because of a law banning members of her sex from serving as jurors. Cf., *e. g., Powers* v. *Ohio*, 499 U. S. 400, 409–410 (1991); *Palmore* v. *Sidoti*, 466 U. S. 429, 431–432 (1984); *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880). The injury is to personal dignity and to the individual's right to participate in the political process. *Powers, supra*, at 410. The neutrality of the Fourteenth Amendment's guarantee is confirmed by the fact that the Court has no difficulty in finding a constitutional wrong in this case, which involves males excluded from jury service because of their gender.

The importance of individual rights to our analysis prompts a further observation concerning what I conceive to be the intended effect of today's decision. We do not prohibit racial and gender bias in jury selection only to encourage it in jury deliberations. Once seated, a juror should not give free rein to some racial or gender bias of his or her own. The jury system is a kind of compact by which power is transferred from the judge to jury, the jury in turn deciding the case in accord with the instructions defining the relevant issues for consideration. The wise limitation on the authority of courts to inquire into the reasons underlying a jury's verdict does not mean that a jury ought to disregard the court's instructions. A juror who allows racial or gender bias to influence assessment of the case breaches the compact and renounces his or her oath.

In this regard, it is important to recognize that a juror sits not as a representative of a racial or sexual group but as an individual citizen. Nothing would be more pernicious to the jury system than for society to presume that persons of different backgrounds go to the jury room to voice prejudice. Cf. *Metro Broadcasting, supra,* at 618 (O'CONNOR, J., dissenting). The jury pool must be representative of the community, but that is a structural mechanism for preventing bias, not enfranchising it. See, *e. g., Ballard* v. *United States,* 329 U. S. 187, 193 (1946); *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217 (1946). "Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system." *Id.,* at 220. Thus, the Constitution guarantees a right only to an impartial jury, not to a jury composed of members of a particular race or gender. See *Holland* v. *Illinois,* 493 U. S. 474 (1990); *Strauder,* 100 U. S., at 305.

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For these reasons, I concur in the judgment of the Court holding that peremptory strikes based on gender violate the Equal Protection Clause.

CHIEF JUSTICE REHNQUIST, dissenting.

I agree with the dissent of JUSTICE SCALIA, which I have joined. I add these words in support of its conclusion. Accepting *Batson* v. *Kentucky,* 476 U. S. 79 (1986), as correctly decided, there are sufficient differences between race and gender discrimination such that the principle of *Batson* should not be extended to peremptory challenges to potential jurors based on sex.

That race and sex discrimination are different is acknowledged by our equal protection jurisprudence, which accords different levels of protection to the two groups. Classifications based on race are inherently suspect, triggering "strict scrutiny," while gender-based classifications are judged under a heightened, but less searching, standard of review. *Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 724 (1982). Racial groups comprise numerical minorities in our society, warranting in some situations a greater need for protection, whereas the population is divided almost equally between men and women. Furthermore, while substantial discrimination against both groups still lingers in our society, racial equality has proved a more challenging goal to achieve on many fronts than gender equality. See, *e. g.*, D. Kirp, M. Yudof, & M. Franks, Gender Justice 137 (1986).

Batson, which involved a black defendant challenging the removal of black jurors, announced a sea change in the jury selection process. In balancing the dictates of equal protection and the historical practice of peremptory challenges, long recognized as securing fairness in trials, the Court concluded that the command of the Equal Protection Clause was superior. But the Court was careful that its rule not "undermine the contribution the challenge generally makes to the administration of justice." 476 U. S., at 98–99. *Batson* is best understood as a recognition that race lies at the core of the commands of the Fourteenth Amendment. Not surprisingly, all of our post-*Batson* cases have dealt with the use of peremptory strikes to remove black or racially identified venirepersons, and all have described *Batson* as fashioning a rule aimed at preventing purposeful discrimination against a cognizable racial group.* As JUSTICE O'CONNOR once recognized, *Batson* does not apply "[o]utside the uniquely sensitive area of race." *Brown* v. *North Carolina*, 479 U. S. 940, 942 (1986) (opinion concurring in denial of certiorari).

Under the Equal Protection Clause, these differences mean that the balance should tilt in favor of peremptory challenges when sex, not race, is the issue. Unlike the

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*See *Georgia* v. *McCollum*, 505 U. S. 42 (1992) (blacks); *Hernandez* v. *New York*, 500 U. S. 352 (1991) (Latinos); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614 (1991) (blacks); *Powers* v. *Ohio*, 499 U. S. 400, 404–405 (1991) (blacks); *Holland* v. *Illinois*, 493 U. S. 474, 476–477 (1990) (blacks); *Griffith* v. *Kentucky*, 479 U. S. 314, 316 (1987) (blacks); *Allen* v. *Hardy*, 478 U. S. 255, 259 (1986) (blacks and Hispanics).

Court, I think the State has shown that jury strikes on the basis of gender "substantially further" the State's legitimate interest in achieving a fair and impartial trial through the venerable practice of peremptory challenges. *Swain* v. *Alabama,* 380 U. S. 202, 212–220 (1965) (tracing the "very old credentials" of peremptory challenges); *Batson, supra,* at 118–120 (Burger, C. J., dissenting); *post,* at 161–162 (SCALIA, J., dissenting). The two sexes differ, both biologically and, to a diminishing extent, in experience. It is not merely "stereotyping" to say that these differences may produce a difference in outlook which is brought to the jury room. Accordingly, use of peremptory challenges on the basis of sex is generally not the sort of derogatory and invidious act which peremptory challenges directed at black jurors may be.

JUSTICE O'CONNOR's concurring opinion recognizes several of the costs associated with extending *Batson* to gender-based peremptory challenges—lengthier trials, an increase in the number and complexity of appeals addressing jury selection, and a "diminished . . . ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes." *Ante,* at 149–150. These costs are, in my view, needlessly imposed by the Court's opinion, because the Constitution simply does not require the result that it reaches.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

Today's opinion is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or as the Court would have it, the genders), and how sternly we disapprove the male chauvinist attitudes of our predecessors. The price to be paid for this display—a modest price, surely—is that most of the opinion is quite irrelevant to the case at hand. The hasty reader will be surprised to learn, for example, that this lawsuit involves a complaint about the use of peremptory challenges to exclude *men* from a petit jury. To be sure, petitioner, a man, used all but one of *his* peremptory strikes to remove *women* from the jury (he used his last challenge to strike the sole remaining male from the pool), but the validity of *his* strikes is not before us. Nonetheless, the Court treats itself to an extended discussion of the historic exclusion of women not only from jury service, but also from service at the bar (which is rather like jury service, in that it involves going to the courthouse a lot). See *ante*, at 131–136. All this, as I say, is irrelevant, since the case involves state action that allegedly discriminates against men. The parties do not contest that discrimination on the basis of sex[1] is subject to what our cases call "heightened scrutiny," and the citation of one of those cases (preferably one involving men rather than women, see, *e. g., Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 723–724 (1982)) is all that was needed.

The Court also spends time establishing that the use of sex as a proxy for particular views or sympathies is unwise and perhaps irrational. The opinion stresses the lack of statistical evidence to support the widely held belief that, at least in certain types of cases, a juror's sex has some statistically significant predictive value as to how the juror will behave. See *ante*, at 137–139, and n. 9. This assertion seems to place the Court in opposition to its earlier Sixth Amendment "fair cross-section" cases. See, *e. g., Taylor* v. *Louisiana*, 419 U. S. 522, 532, n. 12 (1975) ("Controlled studies . . . have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result"). But times and trends do change, and unisex is unquestionably in fashion. Personally, I am less inclined to demand statistics, and more inclined to credit the perceptions of experienced litigators who have had money on the line. But it does not matter. The Court's fervent defense of the proposition *il n'y a pas de différence entre les hommes et les femmes* (it stereotypes the opposite view as hateful "stereotyping") turns out to be, like its recounting of the history of sex discrimination against women, utterly irrelevant. Even if sex was a remarkably good predictor in certain cases, the Court would find its use in peremptories unconstitutional. See *ante,* at 139, n. 11; cf. *ante,* at 148–149 (O'CONNOR, J., concurring).

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[1] Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution's peremptories). The case involves, therefore, sex discrimination plain and simple.

Of course the relationship of sex to partiality *would have been* relevant if the Court had demanded in this case what it ordinarily demands: that the complaining party have suffered some injury. Leaving aside for the moment the reality that the defendant himself had the opportunity to strike women from the jury, the defendant would have some cause to complain about the prosecutor's striking male jurors if male jurors tend to be more favorable toward defendants in paternity suits. But if men and women jurors are (as the Court thinks) fungible, then the only arguable injury from the prosecutor's "impermissible" use of male sex as the basis for his peremptories is injury to the stricken juror, not to the defendant. Indeed, far from having suffered harm, petitioner, a state actor under our precedents, see *Georgia* v. *McCollum,* 505 U. S. 42, 50–51 (1992); cf. *Edmonson* v. *Leesville Concrete Co.,* 500 U. S. 614, 626–627 (1991), has himself actually *inflicted* harm on female jurors.[2] The Court today presumably supplies petitioner with a cause of action by applying the uniquely expansive third-party standing analysis of *Powers* v. *Ohio*, 499 U. S. 400, 415 (1991), according petitioner a remedy because of the wrong done to male jurors. This case illustrates why making restitution to Paul when it is Peter who has been robbed is such a bad idea. Not only has petitioner, by implication of the Court's own reasoning, suffered no harm, but the scientific evidence presented at trial established petitioner's paternity with 99.92% accuracy. Insofar as petitioner is concerned, this is a case of harmless error if there ever was one; a retrial will do nothing but divert the State's judicial and prosecutorial resources, allowing either petitioner or some other malefactor to go free.

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[2] I continue to agree with JUSTICE O'CONNOR that *McCollum* and *Edmondson* erred in making civil litigants and criminal defendants state actors for purposes of the Equal Protection Clause. I do not, however, share her belief that correcting that error while continuing to consider the exercise of peremptories by prosecutors a denial of equal protection will make things right. If, in accordance with common perception but con-

The core of the Court's reasoning is that peremptory challenges on the basis of any group characteristic subject to heightened scrutiny are inconsistent with the guarantee of the Equal Protection Clause. That conclusion can be reached only by focusing unrealistically upon individual exercises of the peremptory challenge, and ignoring the totality of the practice. Since all groups are subject to the peremptory challenge (and will be made the object of it, depending upon the nature of the particular case) it is hard to see how any group is denied equal protection. See *id.*, at 423–424 (SCALIA, J., dissenting); *Batson* v. *Kentucky*, 476 U. S. 79, 137–138 (1986) (REHNQUIST, J., dissenting). That explains why peremptory challenges coexisted with the Equal Protection Clause for 120 years. This case is a perfect example of how the system as a whole is evenhanded. While the only claim before the Court is petitioner's complaint that the prosecutor struck male jurors, for every man

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trary to the Court's unisex creed, women really will decide some cases differently from men, allowing defendants alone to strike jurors on the basis of sex will produce—and will be seen to produce—juries intentionally weighted in the defendant's favor: no women jurors, for example, in a rape prosecution. That is not a desirable outcome.

struck by the government petitioner's own lawyer struck a woman. To say that men were singled out for discriminatory treatment in this process is preposterous. The situation would be different if both sides systematically struck individuals of one group, so that the strikes evinced group-based animus and served as a proxy for segregated venire lists. See *Swain* v. *Alabama,* 380 U. S. 202, 223–224 (1965). The pattern here, however, displays not a systemic sex-based animus but each side's desire to get a jury favorably disposed to its case. That is why the Court's characterization of respondent's argument as "reminiscent of the arguments advanced to justify the total exclusion of women from juries," *ante,* at 138, is patently false. Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. See *Powers, supra,* at 424 (SCALIA, J., dissenting). There is discrimination and dishonor in the former, and not in the latter—which explains the 106-year interlude between our holding that exclusion from juries on the basis of race was unconstitutional, *Strauder* v. *West Virginia,* 100 U. S. 303 (1880), and our holding that peremptory challenges on the basis of race were unconstitutional, *Batson* v. *Kentucky, supra.*

Although the Court's legal reasoning in this case is largely obscured by anti-male-chauvinist oratory, to the extent such reasoning is discernible it invalidates much more than sex-based strikes. After identifying unequal treatment (by separating individual exercises of peremptory challenge from the process as a whole), the Court applies the "heightened scrutiny" mode of equal protection analysis used for sex-based discrimination, and concludes that the strikes fail heightened scrutiny because they do not substantially further an important government interest. The Court says that the only important government interest that could be served by peremptory strikes is "securing a fair and impartial jury," *ante,* at 137, and n. 8.[3] It refuses to accept respondent's argument that these strikes further that interest by eliminating a group (men) which may be partial to male defendants, because it will not accept any argument based on "'the very stereotype the law condemns.'" *Ante,* at 138 (quoting *Powers,* 499 U. S., at 410). This analysis, entirely eliminating the only allowable argument, implies that sex-based strikes do not even rationally further a legitimate government interest, let alone pass heightened scrutiny. That places *all* peremptory strikes based on *any* group characteristic at risk, since they can all be denominated "stereotypes." Perhaps, however (though I do not see why it should be so), only the stereotyping of groups entitled to heightened or strict scrutiny constitutes "the very stereotype the law condemns"—so that other stereotyping (*e. g.,* wide-eyed blondes and football players are dumb) remains OK. Or perhaps when the Court refers to "impermissible stereotypes," *ante,* at 139, n. 11, it means the adjective to be limiting rather than descriptive—so that we can expect to learn from the Court's peremptory/stereotyping jurisprudence in the future which stereotypes the Constitution frowns upon and which it does not.

Even if the line of our later cases guaranteed by today's decision limits the theoretically boundless *Batson* principle to race, sex, and perhaps other classifications subject to heightened scrutiny (which presumably would include religious belief, see *Larson* v. *Valente,* 456 U. S. 228, 244–246 (1982)), much damage has been done. It has been done, first and foremost, to the peremptory challenge system, which loses its whole character when (in order to defend against "impermissible stereotyping" claims) "reasons" for strikes must be given. The right of peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.' " *Lewis* v. *United States,* 146 U. S. 370, 378 (1892), quoting *Lamb* v. *State,* 36 Wis. 424, 427 (1874). See also *Lewis, supra,* at 376; *United States* v. *Marchant,* 12 Wheat. 480, 482 (1827) (Story, J.); 4 W. Blackstone, Commentaries *353. The loss of the real peremptory will be felt most keenly by the criminal defendant, see *Georgia* v. *McCollum,* 505 U. S. 42 (1992), whom we have until recently thought "should not be held to accept a juror, apparently indifferent, whom he distrusted for any reason or for no reason." *Lamb, supra,* at 426. And make no mistake about it: there really is no substitute for the peremptory. *Voir dire* (though it can be expected to expand as a consequence of today's decision) cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about them. It is fruitless to inquire of a male juror whether he harbors any subliminal prejudice in favor of unwed fathers.

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[3] It does not seem to me that even this premise is correct. Wise observers have long understood that the appearance of justice is as important as its reality. If the system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function. See, *e. g.,* 4 W. Blackstone, Commentaries *353. In point of fact, that may well be its greater value.

And damage has been done, secondarily, to the entire justice system, which will bear the burden of the expanded quest for "reasoned peremptories" that the Court demands. The extension of *Batson* to sex, and almost certainly beyond, cf. *Batson,* 476 U. S., at 124 (Burger, C. J., dissenting), will provide the basis for extensive collateral litigation, which especially the criminal defendant (who litigates full time and cost free) can be expected to pursue. While demographic reality places some limit on the number of cases in which race-based challenges will be an issue, every case contains a potential sex-based claim. Another consequence, as I have mentioned, is a lengthening of the *voir dire* process that already burdens trial courts.

The irrationality of today's strike-by-strike approach to equal protection is evident from the consequences of extending it to its logical conclusion. If a fair and impartial trial is a prosecutor's only legitimate goal; if adversarial trial stratagems must be tested against that goal in abstraction from their role within the system as a whole; and if, so tested, sex-based stratagems do not survive heightened scrutiny—then the prosecutor presumably violates the Constitution when he selects a male or female police officer to testify because he believes one or the other sex might be more convincing in the context of the particular case, or because he believes one or the other might be more appealing to a predominantly male or female jury. A decision to stress one line of argument or present certain witnesses before a mostly female jury—for example, to stress that the defendant victimized women—becomes, under the Court's reasoning, intentional discrimination by a state actor on the basis of gender.

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In order, it seems to me, not to eliminate any real denial of equal protection, but simply to pay conspicuous obeisance to the equality of the sexes, the Court imperils a practice that has been considered an essential part of fair jury trial since the dawn of the common law. The Constitution of the United States neither requires nor permits this vandalizing of our people's traditions.

For these reasons, I dissent.

CENTRAL BANK OF DENVER, N. A. *v.* FIRST INTERSTATE BANK OF DENVER, N. A., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 92–854. Argued November 30, 1993—Decided April 19, 1994

As this Court has interpreted it, § 10(b) of the Securities Exchange Act of 1934 imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities. Following a public building authority's default on certain bonds secured by landowner assessment liens, respondents, as purchasers of the bonds, filed suit against the authority, the bonds' underwriters, the developer of the land in question, and petitioner bank, as the indenture trustee for the bond issues. Respondents alleged that the first three defendants had violated § 10(b) in connection with the sale of the bonds, and that petitioner was "secondarily liable under § 10(b) for its conduct in aiding and abetting the [other defendants'] fraud." The District Court granted summary judgment to petitioner, but the Court of Appeals reversed in light of Circuit precedent allowing private aiding and abetting actions under § 10(b).

Held: A private plaintiff may not maintain an aiding and abetting suit under § 10(b). Pp. 170–192.

(a) This case is resolved by the statutory text, which governs what conduct is covered by § 10(b). See, *e. g., Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185, 197, 199. That text—which makes it "unlawful for any person, directly or indirectly, . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance"—prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act, and does not reach those who aid and abet a violation. The "directly or indirectly" phrase does not cover aiding and abetting, since liability for aiding and abetting would extend beyond persons who engage, even indirectly, in a proscribed activity to include those who merely give some degree of aid to violators, and since the "directly or indirectly" language is used in numerous 1934 Act provisions in a way that does not impose aiding and abetting liability. Pp. 170–178.

(b) Even if the § 10(b) text did not answer the question at issue, the same result would be reached by inferring how the 1934 Congress would have addressed the question had it expressly included a § 10(b) private right of action in the 1934 Act. See *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U. S. 286, 294. None of the express private causes of action in the federal securities laws imposes liability on aiders and abettors. It thus can be inferred that Congress likely would not have attached such liability to a private § 10(b) cause of action. See *id.*, at 297. Pp. 178–180.

(c) Contrary to respondents' contention, the statutory silence cannot be interpreted as tantamount to an explicit congressional intent to impose § 10(b) aiding and abetting liability. Congress has not enacted a general civil aiding and abetting tort liability statute, but has instead taken a statute-by-statute approach to such liability. Nor did it provide for aiding and abetting liability in any of the private causes of action in the 1933 and 1934 securities Acts, but mandated it only in provisions enforceable in actions brought by the Securities and Exchange Commission (SEC). Pp. 180–185.

(d) The parties' competing arguments based on other post-1934 legislative developments—respondents' contentions that congressional acquiescence in their position is demonstrated by 1983 and 1988 Committee Reports making oblique references to § 10(b) aiding and abetting liability and by Congress' failure to enact a provision denying such liability after the lower courts began interpreting § 10(b) to include it, and petitioner's assertion that Congress' failure to pass 1957, 1958, and 1960 bills expressly creating such liability reveals an intent not to cover it—deserve little weight in the interpretive process, would not point to a definitive answer in any event, and are therefore rejected. Pp. 185–188.

(e) The SEC's various policy arguments in support of the aiding and abetting cause of action—*e. g.*, that the cause of action deters secondary actors from contributing to fraudulent activities and ensures that defrauded plaintiffs are made whole—cannot override the Court's interpretation of the Act's text and structure because such arguments do not show that adherence to the text and structure would lead to a result so bizarre that Congress could not have intended it. *Demarest* v. *Manspeaker*, 498 U. S. 184, 191. It is far from clear that Congress in 1934 would have decided that the statutory purposes of fair dealing and efficiency in the securities markets would be furthered by the imposition of private aider and abettor liability, in light of the uncertainty and unpredictability of the rules for determining such liability, the potential for excessive litigation arising therefrom, and the resulting difficulties and costs that would be experienced by client companies and investors. Pp. 188–190.

(f) The Court rejects the suggestion that a private civil § 10(b) aiding and abetting cause of action may be based on 18 U. S. C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. The logical consequence of the SEC's approach would be the implication of a civil damages cause of action for every criminal statute passed for the benefit of some particular class of persons. That would work a significant and unacceptable shift in settled interpretive principles. Pp. 190–191.

969 F. 2d 891, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, SOUTER, and GINSBURG, JJ., joined, *post,* p. 192.

Tucker K. Trautman argued the cause for petitioner. With him on the briefs was *Van Aaron Hughes.*

Miles M. Gersh argued the cause for respondents. With him on the brief was *James S. Helfrich.*

Edwin S. Kneedler argued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Paul Gonson, Jacob H. Stillman,* and *Brian D. Bellardo.**

JUSTICE KENNEDY delivered the opinion of the Court.

As we have interpreted it, § 10(b) of the Securities Exchange Act of 1934 imposes private civil liability on those who commit a manipulative or deceptive act in connection with the purchase or sale of securities. In this case, we must answer a question reserved in two earlier decisions: whether private civil liability under § 10(b) extends as well to those who do not engage in the manipulative or deceptive practice, but who aid and abet the violation. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 379, n. 5 (1983); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 191–192, n. 7 (1976).

**Theodore B. Olson, Theodore J. Boutrous, Jr.,* and *William J. Fitzpatrick* filed a brief for the Securities Industry Association as *amicus curiae* urging reversal.

Briefs of *amicus curiae* urging affirmance were filed for the Association of the Bar of the City of New York by *Harvey J. Goldschmid, John D. Feerick, Sheldon H. Elsen,* and *Jill E. Fisch;* and for the Trial Lawyers for Public Justice, P. C., et al. by *Priscilla R. Budeiri* and *Arthur H. Bryant.*

Briefs of *amici curiae* were filed for the American Institute of Certified Public Accountants by *Louis A. Craco, Richard I. Miller,* and *David P. Murray;* and for the National Association of Securities and Commercial Law Attorneys by *William S. Lerach, Leonard B. Simon, Kevin P. Roddy,* and *Paul F. Bennett.*

I

In 1986 and 1988, the Colorado Springs-Stetson Hills Public Building Authority (Authority) issued a total of $26 million in bonds to finance public improvements at Stetson Hills, a planned residential and commercial development in Colorado Springs. Petitioner Central Bank of Denver served as indenture trustee for the bond issues.

The bonds were secured by landowner assessment liens, which covered about 250 acres for the 1986 bond issue and about 272 acres for the 1988 bond issue. The bond covenants required that the land subject to the liens be worth at least 160% of the bonds' outstanding principal and interest. The covenants required AmWest Development, the developer of Stetson Hills, to give Central Bank an annual report containing evidence that the 160% test was met.

In January 1988, AmWest provided Central Bank with an updated appraisal of the land securing the 1986 bonds and of the land proposed to secure the 1988 bonds. The 1988 appraisal showed land values almost unchanged from the 1986 appraisal. Soon afterwards, Central Bank received a letter from the senior underwriter for the 1986 bonds. Noting that property values were declining in Colorado Springs and that Central Bank was operating on an appraisal over 16 months old, the underwriter expressed concern that the 160% test was not being met.

Central Bank asked its in-house appraiser to review the updated 1988 appraisal. The in-house appraiser decided that the values listed in the appraisal appeared optimistic considering the local real estate market. He suggested that

Central Bank retain an outside appraiser to conduct an independent review of the 1988 appraisal. After an exchange of letters between Central Bank and AmWest in early 1988, Central Bank agreed to delay independent review of the appraisal until the end of the year, six months after the June 1988 closing on the bond issue. Before the independent review was complete, however, the Authority defaulted on the 1988 bonds.

Respondents First Interstate Bank of Denver and Jack K. Naber had purchased $2.1 million of the 1988 bonds. After the default, respondents sued the Authority, the 1988 underwriter, a junior underwriter, an AmWest director, and Central Bank for violations of § 10(b) of the Securities Exchange Act of 1934. The complaint alleged that the Authority, the underwriter defendants, and the AmWest director had violated § 10(b). The complaint also alleged that Central Bank was "secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud." App. 26.

The United States District Court for the District of Colorado granted summary judgment to Central Bank. The United States Court of Appeals for the Tenth Circuit reversed. *First Interstate Bank of Denver, N. A.* v. *Pring*, 969 F. 2d 891 (1992).

The Court of Appeals first set forth the elements of the § 10(b) aiding and abetting cause of action in the Tenth Circuit: (1) a primary violation of § 10(b); (2) recklessness by the aider and abettor as to the existence of the primary violation; and (3) substantial assistance given to the primary violator by the aider and abettor. *Id.*, at 898–903.

Applying that standard, the Court of Appeals found that Central Bank was aware of concerns about the accuracy of the 1988 appraisal. Central Bank knew both that the sale of the 1988 bonds was imminent and that purchasers were using the 1988 appraisal to evaluate the collateral for the bonds. Under those circumstances, the court said, Central Bank's awareness of the alleged inadequacies of the updated, but almost unchanged, 1988 appraisal could support a finding of extreme departure from standards of ordinary care. The court thus found that respondents had established a genuine issue of material fact regarding the recklessness element of aiding and abetting liability. *Id.*, at 904. On the separate question whether Central Bank rendered substantial assistance to the primary violators, the Court of Appeals found that a reasonable trier of fact could conclude that Central Bank had rendered substantial assistance by delaying the independent review of the appraisal. *Ibid.*

Like the Court of Appeals in this case, other federal courts have allowed private aiding and abetting actions under § 10(b). The first and leading case to impose the liability was *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673 (ND Ind. 1966), aff'd, 417 F. 2d 147 (CA7 1969), cert. denied, 397 U. S. 989 (1970). The court reasoned that "[i]n the absence of a clear legislative expression to the contrary, the statute must be flexibly applied so as to implement its policies and purposes." 259 F. Supp., at 680–681. Since 1966, numerous courts have taken the same position. See, *e. g., Cleary* v. *Perfectune, Inc.*, 700 F. 2d 774, 777 (CA1 1983); *Kerbs* v. *Fall River Industries, Inc.*, 502 F. 2d 731, 740 (CA10 1974).

After our decisions in *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462 (1977), and *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976), where we paid close attention to the statutory text in defining the scope of conduct prohibited by § 10(b), courts and commentators began to question whether aiding and abetting liability under § 10(b) was still available. Professor Fischel opined that the "theory of secondary liability [under § 10(b) was] no longer viable in light of recent Supreme Court decisions strictly interpreting the federal securities laws." Secondary Liability Under Section 10(b) of the Securities Act of 1934, 69 Calif. L. Rev. 80, 82 (1981). In 1981, the District Court for the Eastern District of Michigan found it "doubtful that a claim for 'aiding and abetting' . . .

will continue to exist under 10(b)." *Benoay* v. *Decker,* 517 F. Supp. 490, 495, aff'd, 735 F. 2d 1363 (CA6 1984). The same year, the Ninth Circuit stated that the "status of aiding and abetting as a basis for liability under the securities laws [was] in some doubt." *Little* v. *Valley National Bank of Arizona,* 650 F. 2d 218, 220, n. 3. The Ninth Circuit later noted that "[a]iding and abetting and other 'add-on' theories of liability have been justified by reference to the broad policy objectives of the securities acts. . . . The Supreme Court has rejected this justification for an expansive reading of the statutes and instead prescribed a strict statutory construction approach to determining liability under the acts." *SEC* v. *Seaboard Corp.,* 677 F. 2d 1301, 1311, n. 12 (1982). The Fifth Circuit has stated: "[I]t is now apparent that open-ended readings of the duty stated by Rule 10b–5 threaten to rearrange the congressional scheme. The added layer of liability . . . for aiding and abetting . . . is particularly problematic. . . . There is a powerful argument that . . . aider and abettor liability should not be enforceable by private parties pursuing an implied right of action." *Akin* v. *Q–L Investments, Inc.,* 959 F. 2d 521, 525 (1992). Indeed, the Seventh Circuit has held that the defendant must have committed a manipulative or deceptive act to be liable under § 10(b), a requirement that in effect forecloses liability on those who do no more than aid or abet a 10b–5 violation. See, *e. g., Barker* v. *Henderson, Franklin, Starnes & Holt,* 797 F. 2d 490, 495 (1986).

We granted certiorari to resolve the continuing confusion over the existence and scope of the § 10(b) aiding and abetting action. 508 U. S. 959 (1993).

II

In the wake of the 1929 stock market crash and in response to reports of widespread abuses in the securities industry, the 73d Congress enacted two landmark pieces of securities legislation: the Securities Act of 1933 (1933 Act) and the

Securities Exchange Act of 1934 (1934 Act). 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1988 ed. and Supp. IV); 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1988 ed. and Supp. IV). The 1933 Act regulates initial distributions of securities, and the 1934 Act for the most part regulates post-distribution trading. *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U. S. 723, 752 (1975). Together, the Acts "embrace a fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor.*" *Affiliated Ute Citizens of Utah* v. *United States,* 406 U. S. 128, 151 (1972) (internal quotation marks omitted).

The 1933 and 1934 Acts create an extensive scheme of civil liability. The Securities and Exchange Commission (SEC) may bring administrative actions and injunctive proceedings to enforce a variety of statutory prohibitions. Private plaintiffs may sue under the express private rights of action contained in the Acts. They may also sue under private rights of action we have found to be implied by the terms of §§ 10(b) and 14(a) of the 1934 Act. *Superintendent of Ins. of N. Y.* v. *Bankers Life & Casualty Co.,* 404 U. S. 6, 13, n. 9 (1971) (§ 10(b)); *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 430–435 (1964) (§ 14(a)). This case concerns the most familiar private cause of action: the one we have found to be implied by § 10(b), the general antifraud provision of the 1934 Act. Section 10(b) states:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U. S. C. § 78j.

Rule 10b–5, adopted by the SEC in 1942, casts the proscription in similar terms:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1993).

In our cases addressing § 10(b) and Rule 10b–5, we have confronted two main issues. First, we have determined the scope of conduct prohibited by § 10(b). See, *e. g., Dirks* v. *SEC,* 463 U. S. 646 (1983); *Aaron* v. *SEC,* 446 U. S. 680 (1980); *Chiarella* v. *United States,* 445 U. S. 222 (1980); *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462 (1977); *Ernst & Ernst* v. *Hochfelder,* 425 U. S. 185 (1976). Second, in cases where the defendant has committed a violation of § 10(b), we have decided questions about the elements of the 10b–5 private liability scheme: for example, whether there is a right to contribution, what the statute of limitations is, whether there is a reliance requirement, and whether there is an *in pari delicto* defense. See *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau,* 508 U. S. 286 (1993); *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson,* 501 U. S. 350 (1991); *Basic Inc.* v. *Levinson,* 485 U. S. 224 (1988); *Bateman Eichler, Hill Richards, Inc.* v. *Berner,* 472 U. S. 299 (1985); see also *Blue Chip Stamps, supra; Schlick* v. *Penn-Dixie Cement Corp.,* 507 F. 2d 374 (CA2 1974); cf. *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U. S. 1083 (1991) (§ 14); *Schreiber* v. *Burlington Northern, Inc.,* 472 U. S. 1 (1985) (same).

The latter issue, determining the elements of the 10b–5 private liability scheme, has posed difficulty because Congress did not create a private § 10(b) cause of action and had no occasion to provide guidance about the elements of a private liability scheme. We thus have had "to infer how the 1934 Congress would have addressed the issue[s] had the 10b–5 action been included as an express provision in the 1934 Act." *Musick, Peeler, supra,* at 294.

With respect, however, to the first issue, the scope of conduct prohibited by § 10(b), the text of the statute controls our decision. In § 10(b), Congress prohibited manipulative or deceptive acts in connection with the purchase or sale of securities. It envisioned that the SEC would enforce the statutory prohibition through administrative and injunctive actions. Of course, a private plaintiff now may bring suit against violators of § 10(b). But the private plaintiff may not bring a 10b–5 suit against a defendant for acts not prohibited by the text of § 10(b). To the contrary, our cases considering the scope of conduct prohibited by § 10(b) in private suits have emphasized adherence to the statutory language, " '[t]he starting point in every case involving construction of a statute.' " *Ernst & Ernst, supra,* at 197 (quoting *Blue Chip Stamps,* 421 U. S., at 756 (Powell, J., concurring)); see *Chiarella, supra,* at 226; *Santa Fe Industries, supra,* at 472. We have refused to allow 10b–5 challenges to conduct not prohibited by the text of the statute.

In *Ernst & Ernst,* we considered whether negligent acts could violate § 10(b). We first noted that "[t]he words 'manipulative or deceptive' used in conjunction with 'device or contrivance' strongly suggest that § 10(b) was intended to proscribe knowing or intentional misconduct." 425 U. S., at 197. The SEC argued that the broad congressional purposes behind the Act—to protect investors from false and misleading practices that might injure them—suggested that § 10(b) should also reach negligent conduct. *Id.*, at 198. We rejected that argument, concluding that the SEC's interpretation would "add a gloss to the operative language of the statute quite different from its commonly accepted meaning." *Id.*, at 199.

In *Santa Fe Industries*, another case involving "the reach and coverage of § 10(b)," 430 U. S., at 464, we considered whether § 10(b) "reached breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure." *Id.*, at 470 (internal quotation marks omitted). We held that it did not, reaffirming our decision in *Ernst & Ernst* and emphasizing that the "language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception." 430 U. S., at 473.

Later, in *Chiarella*, we considered whether § 10(b) is violated when a person trades securities without disclosing inside information. We held that § 10(b) is not violated under those circumstances unless the trader has an independent duty of disclosure. In reaching our conclusion, we noted that "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." 445 U. S., at 232. We stated that "the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit," and we found "no basis for applying . . . a new and different theory of liability" in that case. *Id.*, at 234 (internal quotation marks omitted). "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id.*, at 234–235.

Adherence to the text in defining the conduct covered by § 10(b) is consistent with our decisions interpreting other provisions of the securities Acts. In *Pinter* v. *Dahl*, 486 U. S. 622 (1988), for example, we interpreted the word "seller" in § 12(1) of the 1933 Act by "look[ing] first at the language of § 12(1)." *Id.,* at 641. Ruling that a seller is one who solicits securities sales for financial gain, we rejected the broader contention, "grounded in tort doctrine," that persons who participate in the sale can also be deemed sellers. *Id.,* at 649. We found "no support in the statutory language or legislative history for expansion of § 12(1)," *id.,* at 650, and stated that "[t]he ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section." *Id.,* at 653.

Last Term, the Court faced a similar issue, albeit outside the securities context, in a case raising the question whether knowing participation in a breach of fiduciary duty is actionable under the Employee Retirement Income Security Act of 1974 (ERISA). *Mertens* v. *Hewitt Associates,* 508 U. S. 248 (1993). The petitioner in *Mertens* said that the knowing participation cause of action had been available in the common law of trusts and should be available under ERISA. We rejected that argument and noted that no provision in ERISA "explicitly require[d] [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.,* at 254. While plaintiffs had a remedy against nonfiduciaries at common law, that was because "nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach." *Id.,* at 255, n. 5. No comparable duty was set forth in ERISA.

Our consideration of statutory duties, especially in cases interpreting § 10(b), establishes that the statutory text controls the definition of conduct covered by § 10(b). That bodes ill for respondents, for "the language of Section 10(b) does not in terms mention aiding and abetting." Brief for SEC as *Amicus Curiae* 8 (hereinafter Brief for SEC). To overcome this problem, respondents and the SEC suggest (or hint at) the novel argument that the use of the phrase "directly or indirectly" in the text of § 10(b) covers aiding and abetting. See Brief for Respondents 15 ("Inclusion of those who act 'indirectly' suggests a legislative purpose fully consistent with the prohibition of aiding and abetting"); Brief for SEC 8 ("[W]e think that when read in context [§ 10(b)] is broad enough to encompass liability for such 'indirect' violations").

The federal courts have not relied on the "directly or indirectly" language when imposing aiding and abetting liability under § 10(b), and with good reason. There is a basic flaw with this interpretation. According to respondents and the SEC, the "directly or indirectly" language shows that "Congress . . . intended to reach all persons who engage, even if only indirectly, in proscribed activities connected with securities transactions." *Ibid.* The problem, of course, is that aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity; aiding and abetting liability reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do. A further problem with respondents' interpretation of the "directly or indirectly" language is posed by the numerous provisions of the 1934 Act that use the term in a way that does not impose aiding and abetting liability. See § 7(f)(2)(C), 15 U. S. C. § 78g(f)(2)(C) (direct or indirect ownership of stock); § 9(b)(2)–(3), 15 U. S. C. § 78i(b)(2)–(3) (direct or indirect interest in put, call, straddle, option, or privilege); § 13(d)(1), 15 U. S. C. § 78m(d)(1) (direct or indirect ownership); § 16(a), 15 U. S. C. § 78p(a) (direct or indirect ownership); § 20, 15 U. S. C. § 78t (direct or indirect control of person violating Act). In short, respondents' interpretation of the "directly or indirectly" language fails to support their suggestion that the text of § 10(b) itself prohibits aiding and abetting. See 5B A. Jacobs, Litigation and Practice Under Rule 10b–5 § 40.07, p. 2–465 (rev. 1993).

Congress knew how to impose aiding and abetting liability when it chose to do so. See, *e. g.,* Act of Mar. 4, 1909, § 332, 35 Stat. 1152, as amended, 18 U. S. C. § 2 (general criminal aiding and abetting statute); Packers and Stockyards Act, 1921, ch. 64, § 202, 42 Stat. 161, as amended, 7 U. S. C. § 192(g)

(1988 ed. and Supp. IV) (civil aiding and abetting provision); see generally *infra,* at 181–185. If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words "aid" and "abet" in the statutory text. But it did not. Cf. *Pinter* v. *Dahl,* 486 U. S., at 650 ("When Congress wished to create such liability, it had little trouble doing so"); *Blue Chip Stamps,* 421 U. S., at 734 ("When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly").

We reach the uncontroversial conclusion, accepted even by those courts recognizing a § 10(b) aiding and abetting cause of action, that the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation. Unlike those courts, however, we think that conclusion resolves the case. It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text. To be sure, aiding and abetting a wrongdoer ought to be actionable in certain instances. Cf. Restatement (Second) of Torts § 876(b) (1977). The issue, however, is not whether imposing private civil liability on aiders and abettors is good policy but whether aiding and abetting is covered by the statute.

As in earlier cases considering conduct prohibited by § 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act. See *Santa Fe Industries,* 430 U. S., at 473 ("language of § 10(b) gives no indication that Congress meant to prohibit any conduct not involving manipulation or deception"); *Ernst & Ernst,* 425 U. S., at 214 ("When a statute speaks so specifically in terms of manipulation and deception . . . , we are quite unwilling to extend the scope of the statute"). The proscription does not include giving aid to a person who commits a manipulative or deceptive act. We cannot amend the statute to create liability for acts that are not themselves manipulative or deceptive within the meaning of the statute.

III

Because this case concerns the conduct prohibited by § 10(b), the statute itself resolves the case, but even if it did not, we would reach the same result. When the text of § 10(b) does not resolve a particular issue, we attempt to infer "how the 1934 Congress would have addressed the issue had the 10b–5 action been included as an express provision in the 1934 Act." *Musick, Peeler,* 508 U. S., at 294. For that inquiry, we use the express causes of action in the securities Acts as the primary model for the § 10(b) action. The reason is evident: Had the 73d Congress enacted a private § 10(b) right of action, it likely would have designed it in a manner similar to the other private rights of action in the securities Acts. See *id.,* at 294–297.

In *Musick, Peeler,* for example, we recognized a right to contribution under § 10(b). We held that the express rights of contribution contained in §§ 9 and 18 of the Acts were "important . . . feature[s] of the federal securities laws and that consistency require[d] us to adopt a like contribution rule for the right of action existing under Rule 10b–5." *Id.,* at 297. In *Basic Inc.* v. *Levinson,* 485 U. S., at 243, we decided that a plaintiff in a 10b–5 action must prove that he relied on the defendant's misrepresentation in order to recover damages. In so holding, we stated that the "analogous express right of action"—§ 18(a) of the 1934 Act—"includes a reliance requirement." *Ibid.* And in *Blue Chip Stamps,* we held that a 10b–5 plaintiff must have purchased or sold the security to recover damages for the defendant's misrepresentation. We said that "[t]he principal express nonderivative private civil remedies, created by Congress contemporaneously with the passage of § 10(b), . . . are by their terms expressly limited to purchasers or sellers of securities." 421 U. S., at 735–736.

Following that analysis here, we look to the express private causes of action in the 1933 and 1934 Acts. See, *e. g., Musick, Peeler, supra,* at 295–297; *Blue Chip Stamps, supra,* at 735–736. In the 1933 Act, § 11 prohibits false statements or omissions of material fact in registration statements; it identifies the various categories of defendants subject to liability for a violation, but that list does not include aiders and abettors. 15 U. S. C. § 77k. Section 12 prohibits the sale of unregistered, nonexempt securities as well as the sale of securities by means of a material misstatement or omission; and it limits liability to those who offer or sell the security. 15 U. S. C. § 77*l*. In the 1934 Act, § 9 prohibits any person from engaging in manipulative practices such as wash sales, matched orders, and the like. 15 U. S. C. § 78i. Section 16 regulates short-swing trading by owners, directors, and officers. 15 U. S. C. § 78p. Section 18 prohibits any person from making misleading statements in reports filed with the SEC. 15 U. S. C. § 78r. And § 20A, added in 1988, prohibits any person from engaging in insider trading. 15 U. S. C. § 78t–1.

This survey of the express causes of action in the securities Acts reveals that each (like § 10(b)) specifies the conduct for which defendants may be held liable. Some of the express causes of action specify categories of defendants who may be liable; others (like § 10(b)) state only that "any person" who commits one of the prohibited acts may be held liable. The important point for present purposes, however, is that none of the express causes of action in the 1934 Act further imposes liability on one who aids or abets a violation. Cf. 7 U. S. C. § 25(a)(1) (1988 ed. and Supp. IV) (Commodity Exchange Act's private civil aiding and abetting provision).

From the fact that Congress did not attach private aiding and abetting liability to any of the express causes of action in the securities Acts, we can infer that Congress likely would not have attached aiding and abetting liability to § 10(b) had it provided a private § 10(b) cause of action. See

Musick, Peeler, supra, at 297 ("[C]onsistency requires us to adopt a like contribution rule for the right of action existing under Rule 10b–5"). There is no reason to think that Congress would have attached aiding and abetting liability only to § 10(b) and not to any of the express private rights of action in the Act. In *Blue Chip Stamps,* we noted that it would be "anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." 421 U. S., at 736. Here, it would be just as anomalous to impute to Congress an intention in effect to expand the defendant class for 10b–5 actions beyond the bounds delineated for comparable express causes of action.

Our reasoning is confirmed by the fact that respondents' argument would impose 10b–5 aiding and abetting liability when at least one element critical for recovery under 10b–5 is absent: reliance. A plaintiff must show reliance on the defendant's misstatement or omission to recover under 10b–5. *Basic Inc.* v. *Levinson, supra,* at 243. Were we to allow the aiding and abetting action proposed in this case, the defendant could be liable without any showing that the plaintiff relied upon the aider and abettor's statements or actions. See also *Chiarella,* 445 U. S., at 228 (omission actionable only where duty to disclose arises from specific relationship between two parties). Allowing plaintiffs to circumvent the reliance requirement would disregard the careful limits on 10b–5 recovery mandated by our earlier cases.

IV

Respondents make further arguments for imposition of § 10(b) aiding and abetting liability, none of which leads us to a different answer.

A

The text does not support their point, but respondents and some *amici* invoke a broad-based notion of congressional intent. They say that Congress legislated with an understanding of general principles of tort law and that aiding and abetting liability was "well established in both civil and criminal actions by 1934." Brief for SEC 10. Thus, "Congress intended to include" aiding and abetting liability in the 1934 Act. *Id.*, at 11. A brief history of aiding and abetting liability serves to dispose of this argument.

Aiding and abetting is an ancient criminal law doctrine. See *United States* v. *Peoni*, 100 F. 2d 401, 402 (CA2 1938); 1 M. Hale, Pleas of the Crown 615 (1736). Though there is no federal common law of crimes, Congress in 1909 enacted what is now 18 U. S. C. § 2, a general aiding and abetting statute applicable to all federal criminal offenses. Act of Mar. 4, 1909, § 332, 35 Stat. 1152. The statute decrees that those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime. *Nye & Nissen* v. *United States*, 336 U. S. 613, 619 (1949).

The Restatement of Torts, under a concert of action principle, accepts a doctrine with rough similarity to criminal aiding and abetting. An actor is liable for harm resulting to a third person from the tortious conduct of another "if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . . ." Restatement (Second) of Torts § 876(b) (1977); see also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 322–324 (5th ed. 1984). The doctrine has been at best uncertain in application, however. As the Court of Appeals for the District of Columbia Circuit noted in a comprehensive opinion on the subject, the leading cases applying this doctrine are statutory securities cases, with the common-law precedents "largely confined to isolated acts of adolescents in rural society." *Halberstam* v. *Welch*, 705 F. 2d 472, 489 (1983). Indeed, in some States, it is still unclear whether there is aiding and abetting tort liability of the kind set forth in § 876(b) of the Restatement.

See, *e. g., FDIC* v. *S. Prawer & Co.,* 829 F. Supp. 453, 457 (Me. 1993) (in Maine, "[i]t is clear . . . that aiding and abetting liability did not exist under the common law, but was entirely a creature of statute"); *In re Asbestos School Litigation,* No. 83–0268, 1991 U. S. Dist. LEXIS 10471, *34 (ED Pa., July 18, 1991) (cause of action under Restatement § 876 "has not yet been applied as a basis for liability" by Pennsylvania courts); *Meadow Limited Partnership* v. *Heritage Savings and Loan Assn.,* 639 F. Supp. 643, 653 (ED Va. 1986) (aiding and abetting tort based on Restatement § 876 "not expressly recognized by the state courts of the Commonwealth" of Virginia); *Sloane* v. *Fauque,* 239 Mont. 383, 385, 784 P. 2d 895, 896 (1989) (aiding and abetting tort liability is issue "of first impression in Montana").

More to the point, Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties. Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors. See, *e. g., Electronic Laboratory Supply Co.* v. *Cullen,* 977 F. 2d 798, 805–806 (CA3 1992).

Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability. For example, the Internal Revenue Code contains a full section governing aiding and abetting liability, complete with description of scienter and the penalties attached. 26 U. S. C. § 6701 (1988 ed. and Supp. IV). The Commodity Exchange Act contains an explicit aiding and abetting provision that applies to private suits brought under that Act. 7 U. S. C. § 25(a)(1) (1988 ed. and Supp. IV); see also, *e. g.,* 12 U. S. C. § 93(b)(8) (1988 ed. and Supp. IV) (National Bank Act defines violations to include "aiding or abetting"); 12 U. S. C. § 504(h) (1988 ed. and Supp. IV) (Federal Reserve Act defines violations to include "aiding or abetting"); Packers and Stockyards Act, 1921, ch. 64, § 202, 42 Stat. 161, 7 U. S. C. § 192(g) (civil aiding and abetting provision). Indeed, various provisions of the securities laws prohibit aiding and abetting, although violations are remediable only in actions brought by the SEC. See, *e. g.*, 15 U. S. C. § 78*o*(b)(4)(E) (1988 ed. and Supp. IV) (SEC may proceed against brokers and dealers who aid and abet a violation of the securities laws); Insider Trading Sanctions Act of 1984, Pub. L. 98–376, 98 Stat. 1264 (civil penalty provision added in 1984 applicable to those who aid and abet insider trading violations); 15 U. S. C. § 78u–2 (1988 ed., Supp. IV) (civil penalty provision added in 1990 applicable to brokers and dealers who aid and abet various violations of the Act).

With this background in mind, we think respondents' argument based on implicit congressional intent can be taken in one of three ways. First, respondents might be saying that aiding and abetting should attach to all federal civil statutes, even laws that do not contain an explicit aiding and abetting provision. But neither respondents nor their *amici* cite, and we have not found, any precedent for that vast expansion of federal law. It does not appear Congress was operating on that assumption in 1934, or since then, given that it has been quite explicit in imposing civil aiding and abetting liability in other instances. We decline to recognize such a comprehensive rule with no expression of congressional direction to do so.

Second, on a more narrow ground, respondents' congressional intent argument might be interpreted to suggest that the 73d Congress intended to include aiding and abetting only in § 10(b). But nothing in the text or history of § 10(b) even implies that aiding and abetting was covered by the statutory prohibition on manipulative and deceptive conduct.

Third, respondents' congressional intent argument might be construed as a contention that the 73d Congress intended to impose aiding and abetting liability for all of the express causes of action contained in the 1934 Act—and thus would have imposed aiding and abetting liability in § 10(b) actions had it enacted a private § 10(b) right of action. As we have explained, however, none of the express private causes of action in the Act imposes aiding and abetting liability, and there is no evidence that Congress intended that liability for the express causes of action.

Even assuming, moreover, a deeply rooted background of aiding and abetting tort liability, it does not follow that Congress intended to apply that kind of liability to the private causes of action in the securities Acts. Cf. *Mertens*, 508 U. S., at 254 (omission of knowing participation liability in ERISA "appears all the more deliberate in light of the fact that 'knowing participation' liability on the part of *both* cotrustees *and* third persons was well established under the common law of trusts"). In addition, Congress did not overlook secondary liability when it created the private rights of action in the 1934 Act. Section 20 of the 1934 Act imposes liability on "controlling person[s]"—persons who "contro[l] any person liable under any provision of this chapter or of any rule or regulation thereunder." 15 U. S. C. § 78t(a). This suggests that "[w]hen Congress wished to create such [secondary] liability, it had little trouble doing so." *Pinter* v. *Dahl*, 486 U. S., at 650; cf. *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 572 (1979) ("Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly"); see also Fischel, 69 Calif. L. Rev., at 96–98. Aiding and abetting is "a method by which courts create secondary liability" in persons other than the violator of the statute. *Pinter* v. *Dahl*, *supra*, at 648, n. 24. The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere.

We note that the 1929 Uniform Sale of Securities Act contained a private aiding and abetting cause of action. And at the time Congress passed the 1934 Act, the blue sky laws of 11 States and the Territory of Hawaii provided a private right of action against those who aided a fraudulent or illegal sale of securities. See Abrams, The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials, 15 Ford. Urb. L. J. 877, 945, and n. 423 (1987) (listing provisions). Congress enacted the 1933 and 1934 Acts against this backdrop, but did not provide for aiding and abetting liability in any of the private causes of action it authorized.

In sum, it is not plausible to interpret the statutory silence as tantamount to an implicit congressional intent to impose § 10(b) aiding and abetting liability.

B

When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language. See, *e. g.*, *Keene Corp.* v. *United States*, 508 U. S. 200, 212–213 (1993); *Pierce* v. *Underwood*, 487 U. S. 552, 567 (1988); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). Congress has not reenacted the language of § 10(b) since 1934, however, so we need not determine whether the other conditions for applying the reenactment doctrine are present. Cf. *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 527–532 (1994).

Nonetheless, the parties advance competing arguments based on other post-1934 legislative developments to support their differing interpretations of § 10(b). Respondents note that 1983 and 1988 Committee Reports, which make oblique references to aiding and abetting liability, show that those Congresses interpreted § 10(b) to cover aiding and abetting. H. R. Rep. No. 100–910, pp. 27–28 (1988); H. R. Rep. No. 355, p. 10 (1983). But "[w]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."

Public Employees Retirement System of Ohio v. *Betts,* 492 U. S. 158, 168 (1989); see *Weinberger* v. *Rossi,* 456 U. S. 25, 35 (1982); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 118, and n. 13 (1980).

Respondents observe that Congress has amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but has done so without providing that aiding and abetting liability is not available under § 10(b). From that, respondents infer that these Congresses, by silence, have acquiesced in the judicial interpretation of § 10(b). We disagree. This Court has reserved the issue of 10b–5 aiding and abetting liability on two previous occasions. *Herman & MacLean* v. *Huddleston,* 459 U. S., at 379, n. 5; *Ernst & Ernst,* 425 U. S., at 191–192, n. 7. Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation. . . . Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U. S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute." *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 175, n. 1 (1989) (quoting *Johnson* v. *Transportation Agency, Santa Clara Cty.,* 480 U. S. 616, 672 (1987) (SCALIA, J., dissenting)); see *Helvering* v. *Hallock,* 309 U. S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

Central Bank, for its part, points out that in 1957, 1959, and 1960, bills were introduced that would have amended the securities laws to make it "unlawful . . . to aid, abet, counsel, command, induce, or procure the violation of any provision" of the 1934 Act. S. 1179, 86th Cong., 1st Sess. §22 (1959); see also S. 3770, 86th Cong., 2d Sess. §20 (1960); S. 2545, 85th Cong., 1st Sess. §20 (1957). These bills prompted "industry fears that private litigants, not only the SEC, may find in this section a vehicle by which to sue aiders and abettors," and the bills were not passed. SEC Legislation: Hearings before a Subcommittee of the Senate Committee on Banking and Currency on S. 1178, S. 1179, S. 1180, S. 1181, and S. 1182, 86th Cong., 1st Sess., 288, 370 (1959). According to Central Bank, these proposals reveal that those Congresses interpreted §10(b) not to cover aiding and abetting. We have stated, however, that failed legislative proposals are "a particularly dangerous ground on which to rest an interpretation of a prior statute." *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 650 (1990). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Ibid.* (internal quotation marks omitted); see *United States* v. *Wise*, 370 U. S. 405, 411 (1962).

It is true that our cases have not been consistent in rejecting arguments such as these. Compare *Flood* v. *Kuhn*, 407 U. S. 258, 281–282 (1972), with *Pension Benefit Guaranty Corporation*, *supra*, at 650; compare *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 381–382 (1982), with *Aaron* v. *SEC*, 446 U. S., at 694, n. 11. As a general matter, however, we have stated that these arguments deserve little weight in the interpretive process. Even were that not the case, the competing arguments here would not point to a definitive answer. We therefore reject them. As we stated last Term, Congress has acknowledged the 10b–5 action without any further attempt to define it. *Musick, Peeler*, 508 U. S., at 293–294. We find our role limited when the issue is the scope of conduct prohibited by the statute. *Id.*, at 291–292. That issue is our concern here, and we adhere to the statutory text in resolving it.

C

The SEC points to various policy arguments in support of the 10b–5 aiding and abetting cause of action. It argues, for example, that the aiding and abetting cause of action deters secondary actors from contributing to fraudulent activities and ensures that defrauded plaintiffs are made whole. Brief for SEC 16–17.

Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result "so bizarre" that Congress could not have intended it. *Demarest* v. *Manspeaker*, 498 U. S. 184, 191 (1991); cf. *Pinter* v. *Dahl*, 486 U. S., at 654 ("[W]e need not entertain Pinter's policy arguments"); *Santa Fe Industries*, 430 U. S., at 477 (language sufficiently clear to be dispositive). That is not the case here.

Extending the 10b–5 cause of action to aiders and abettors no doubt makes the civil remedy more far reaching, but it does not follow that the objectives of the statute are better served. Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets.

As an initial matter, the rules for determining aiding and abetting liability are unclear, in "an area that demands certainty and predictability." *Pinter* v. *Dahl*, 486 U. S., at 652. That leads to the undesirable result of decisions "made on an ad hoc basis, offering little predictive value" to those who provide services to participants in the securities business. *Ibid.* "[S]uch a shifting and highly fact-oriented disposition of the issue of who may [be liable for] a damages claim for violation of Rule 10b–5" is not a "satisfactory basis for a rule of liability imposed on the conduct of business transactions." *Blue Chip Stamps*, 421 U. S., at 755; see also *Virginia Bank-*

shares, 501 U. S., at 1106 ("The issues would be hazy, their litigation protracted, and their resolution unreliable. Given a choice, we would reject any theory . . . that raised such prospects"). Because of the uncertainty of the governing rules, entities subject to secondary liability as aiders and abettors may find it prudent and necessary, as a business judgment, to abandon substantial defenses and to pay settlements in order to avoid the expense and risk of going to trial.

In addition, "litigation under Rule 10b–5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps, supra,* at 739; see *Virginia Bankshares, supra,* at 1105; S. Rep. No. 792, 73d Cong., 2d Sess., p. 21 (1934) (attorney's fees provision is protection against strike suits). Litigation under 10b–5 thus requires secondary actors to expend large sums even for pretrial defense and the negotiation of settlements. See 138 Cong. Rec. S12605 (Aug. 12, 1992) (remarks of Sen. Sanford) (asserting that in 83% of 10b–5 cases major accounting firms pay $8 in legal fees for every $1 paid in claims).

This uncertainty and excessive litigation can have ripple effects. For example, newer and smaller companies may find it difficult to obtain advice from professionals. A professional may fear that a newer or smaller company may not survive and that business failure would generate securities litigation against the professional, among others. In addition, the increased costs incurred by professionals because of the litigation and settlement costs under 10b–5 may be passed on to their client companies, and in turn incurred by the company's investors, the intended beneficiaries of the statute. See Winter, Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America, 42 Duke L. J. 945, 948–966 (1993).

We hasten to add that competing policy arguments in favor of aiding and abetting liability can also be advanced. The point here, however, is that it is far from clear that Congress in 1934 would have decided that the statutory purposes would be furthered by the imposition of private aider and abettor liability.

D

At oral argument, the SEC suggested that 18 U. S. C. § 2 is "significant" and "very important" in this case. Tr. of Oral Arg. 41, 43. At the outset, we note that this contention is inconsistent with the SEC's argument that recklessness is a sufficient scienter for aiding and abetting liability. Criminal aiding and abetting liability under § 2 requires proof that the defendant "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishe[d] to bring about, that he [sought] by his action to make it succeed." *Nye & Nissen,* 336 U. S., at 619 (internal quotation marks omitted). But recklessness, not intentional wrongdoing, is the theory underlying the aiding and abetting allegations in the case before us.

Furthermore, while it is true that an aider and abettor of a criminal violation of any provision of the 1934 Act, including § 10(b), violates 18 U. S. C. § 2, it does not follow that a private civil aiding and abetting cause of action must also exist. We have been quite reluctant to infer a private right of action from a criminal prohibition alone; in *Cort* v. *Ash,* 422 U. S. 66, 80 (1975), for example, we refused to infer a private right of action from "a bare criminal statute." And we have not suggested that a private right of action exists for all injuries caused by violations of criminal prohibitions. See *Touche Ross,* 442 U. S., at 568 ("[Q]uestion of the existence of a statutory cause of action is, of course, one of statutory construction"). If we were to rely on this reasoning now, we would be obliged to hold that a private right of action exists for every provision of the 1934 Act, for it is a criminal violation to violate any of its provisions. 15 U. S. C. § 78ff. And thus, given 18 U. S. C. § 2, we would also have to hold that a civil aiding and abetting cause of action is available for every provision of the Act. There would be no logical stopping point to this line of reasoning: Every criminal statute passed for the benefit of some particular class of persons would carry with it a concomitant civil damages cause of action.

This approach, with its far-reaching consequences, would work a significant shift in settled interpretive principles regarding implied causes of action. See, *e. g., Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U. S. 11 (1979). We are unwilling to reverse course in this case. We decline to rely only on 18 U. S. C. § 2 as the basis for recognizing a private aiding and abetting right of action under § 10(b).

V

Because the text of § 10(b) does not prohibit aiding and abetting, we hold that a private plaintiff may not maintain an aiding and abetting suit under § 10(b). The absence of § 10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies may be liable as a primary violator under 10b–5, assuming *all* of the requirements for primary liability under Rule 10b–5 are met. See Fischel, 69 Calif. L. Rev., at 107–108. In any complex securities fraud, moreover, there are likely to be multiple violators; in this case, for example, respondents named four defendants as primary violators. App. 24–25.

Respondents concede that Central Bank did not commit a manipulative or deceptive act within the meaning of § 10(b). Tr. of Oral Arg. 31. Instead, in the words of the complaint, Central Bank was "secondarily liable under § 10(b) for its conduct in aiding and abetting the fraud." App. 26. Because of our conclusion that there is no private aiding and abetting liability under § 10(b), Central Bank may not be held liable as an aider and abettor. The District Court's grant of summary judgment to Central Bank was proper, and the judgment of the Court of Appeals is

Reversed.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The main themes of the Court's opinion are that the text of § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U. S. C. § 78j(b), does not expressly mention aiding and abetting liability, and that Congress knows how to legislate. Both propositions are unexceptionable, but neither is reason to eliminate the private right of action against aiders and abettors of violations of § 10(b) and the Securities and Exchange Commission's (SEC's) Rule 10b–5. Because the majority gives short shrift to a long history of aider and abettor liability under § 10(b) and Rule 10b–5, and because its rationale imperils other well-established forms of secondary liability not expressly addressed in the securities laws, I respectfully dissent.

In *hundreds* of judicial and administrative proceedings in every Circuit in the federal system, the courts and the SEC have concluded that aiders and abettors are subject to liability under § 10(b) and Rule 10b–5. See 5B A. Jacobs, Litigation and Practice Under Rule 10b–5 § 40.02 (rev. ed. 1993) (citing cases). While we have reserved decision on the legitimacy of the theory in two cases that did not present it, all 11 Courts of Appeals to have considered the question have recognized a private cause of action against aiders and abettors under § 10(b) and Rule 10b–5.[1] The early aiding and abetting decisions relied upon principles borrowed from tort law; in those cases, judges closer to the times and climate of the 73d Congress than we concluded that holding aiders and abettors liable was consonant with the Exchange Act's purpose to strengthen the antifraud remedies of the common law.[2] One described the aiding and abetting theory, grounded in "general principles of tort law," as a "logical and natural complement" to the private § 10(b) action that furthered the Exchange Act's purpose of "creation and maintenance of a post-issuance securities market that is free from fraudulent practices." *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673, 680 (ND Ind. 1966) (borrowing

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[1] See, *e. g., Cleary* v. *Perfectune, Inc.*, 700 F. 2d 774, 777 (CA1 1983); *IIT* v. *Cornfeld*, 619 F. 2d 909, 922 (CA2 1980); *Monsen* v. *Consolidated Dressed Beef Co.*, 579 F. 2d 793, 799–800 (CA3 1978); *Schatz* v. *Rosenberg*, 943 F. 2d 485, 496–497 (CA4 1991); *Fine* v. *American Solar King Corp.*, 919 F. 2d 290, 300 (CA5 1990); *Moore* v. *Fenex, Inc.*, 809 F. 2d 297, 303 (CA6), cert. denied *sub nom. Moore* v. *Frost*, 483 U. S. 1006 (1987); *Schlifke* v. *Seafirst Corp.*, 866 F. 2d 935, 947 (CA7 1989); *K & S Partnership* v. *Continental Bank, N. A.*, 952 F. 2d 971, 977 (CA8 1991); *Levine* v.

Diamanthuset, Inc., 950 F. 2d 1478, 1483 (CA9 1991); *Farlow* v. *Peat, Marwick, Mitchell & Co.*, 956 F. 2d 982, 986 (CA10 1992); *Schneberger* v. *Wheeler*, 859 F. 2d 1477, 1480 (CA11 1988). The only court not to have squarely recognized aiding and abetting in private § 10(b) actions has done so in an action brought by the SEC, see *Dirks* v. *SEC*, 681 F. 2d 824, 844 (CADC), rev'd on other grounds, 463 U. S. 646 (1983), and has suggested that such a claim was available in private actions, see *Zoelsch* v. *Arthur Andersen & Co.*, 824 F. 2d 27, 35–36 (CADC 1987). The Seventh Circuit's test differs markedly from the other Circuits' in that it requires that the aider and abettor "commit one of the 'manipulative or deceptive' acts prohibited under section 10(b) and rule 10b–5." *Robin* v. *Arthur Young & Co.*, 915 F. 2d 1120, 1123 (CA7 1990).

[2] When § 10(b) was enacted, aiding and abetting liability was widely, albeit not universally, recognized in the law of torts and in state legislation prohibiting misrepresentation in the marketing of securities. See, *e. g.*, 1 T. Cooley, Law of Torts 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who command, direct, advise, encourage, aid or abet its commission, are jointly and severally liable therefor"). Section 16(1) of the Uniform Sale of Securities Act, 9 U. L. A. 385 (1932), conferred a right to sue aiders and abettors of securities fraud, as did the blue sky laws of 11 States. See Abrams, The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials, 15 Ford. Urb. L. J. 877, 945 (1987). The courts' reliance on common-law tort principles in defining the scope of liability under § 10(b) was by no means an anomaly. See, *e. g.*, *American Soc. of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U. S. 556, 565–574 (1982).

formulation from the Restatement of Torts § 876(b) (1939)), later opinion, 286 F. Supp. 702 (1968), aff'd, 417 F. 2d 147 (CA7 1969), cert. denied, 397 U. S. 989 (1970). See also *Pettit* v. *American Stock Exchange*, 217 F. Supp. 21, 28 (SDNY 1963).

The Courts of Appeals have usually applied a familiar three-part test for aider and abettor liability, patterned on the Restatement of Torts formulation, that requires (i) the existence of a primary violation of § 10(b) or Rule 10b–5, (ii) the defendant's knowledge of (or recklessness as to) that primary violation, and (iii) "substantial assistance" of the violation by the defendant. See, *e. g., Cleary* v. *Perfectune, Inc.*, 700 F. 2d 774, 776–777 (CA1 1983); *IIT, An Int'l Investment Trust* v. *Cornfeld*, 619 F. 2d 909, 922 (CA2 1980). If indeed there has been "continuing confusion" concerning the private right of action against aiders and abettors, that confusion has not concerned its basic structure, still less its "existence." See *ante*, at 170. Indeed, in this case, petitioner *assumed* the existence of a right of action against aiders and abettors, and sought review only of the subsidiary questions whether an indenture trustee could be found liable as an aider and abettor absent a breach of an indenture agreement or other duty under state law, and whether it could be liable as an aider and abettor based only on a showing of recklessness. These questions, it is true, have engendered genuine disagreement in the Courts of Appeals.[3] But instead of simply addressing the questions presented by the parties, on which the law really was unsettled, the Court *sua sponte* directed the parties to address a question on which even the petitioner justifiably thought the law was settled, and reaches out to overturn a most considerable body of precedent.[4]

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[3] Compare, for example, the discussion in the opinion below of scienter in cases in which defendant has no disclosure duty, 969 F. 2d 891, 902–903 (CA10 1993), with that in *Schatz* v. *Rosenberg*, 943 F. 2d 485, 496 (CA4 1991), and *Ross* v. *Bolton*, 904 F. 2d 819, 824 (CA2 1990). See also Kuehnle, Secondary Liability Under The Federal Securities Laws—Aiding and Abetting, Conspiracy, Controlling Person, and Agency: Common-Law Principles and The Statutory Scheme, 14 J. Corp. L. 313, 323–324, and n. 53 (1988).

Many of the observations in the majority's opinion would be persuasive if we were considering whether to recognize a private right of action based upon a securities statute enacted recently. Our approach to implied causes of action, as to other matters of statutory construction, has changed markedly since the Exchange Act's passage in 1934. At that time, and indeed until quite recently, courts regularly assumed, in accord with the traditional common-law presumption, that a statute enacted for the benefit of a particular class conferred on members of that class the right to sue violators of that statute.[5] Moreover, shortly before the Exchange Act was passed, this Court instructed that such "remedial" legislation should receive "a broader and more liberal interpretation than that to be drawn from mere dictionary definitions of the words employed by Congress." *Piedmont & Northern R. Co.* v. *ICC,* 286 U. S. 299, 311 (1932). There is a risk of anachronistic error in applying our current approach to implied causes of action, *ante,* at 176–177, to a statute enacted when courts commonly read statutes of this kind broadly to accord with their remedial purposes and regularly approved rights to sue despite statutory silence.

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[4] "As I have said before, 'the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review.' *New Jersey* v. *T. L. O.,* 468 U. S. 1214, 1216 (1984) (dissenting from order directing reargument)." *Patterson* v. *McLean Credit Union,* 485 U. S. 617, 623 (1988) (STEVENS, J., dissenting from order directing reargument).

[5] See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran,* 456 U. S. 353, 374–378 (1982); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.,* 453 U. S. 1, 22–25 (1981) (STEVENS, J., concurring in judgment in part and dissenting in part); *California* v. *Sierra Club,* 451 U. S. 287, 298–301 (1981) (STEVENS, J., concurring). A discussion of the common-law presumption is found in Justice Pitney's opinion for the Court in *Texas & Pacific R. Co.* v. *Rigsby,* 241 U. S. 33, 39–40 (1916). See also, *e. g., Texas & New Orleans R. Co.* v. *Railway Clerks,* 281 U. S. 548, 568–570 (1930).

Even had § 10(b) not been enacted against a backdrop of liberal construction of remedial statutes and judicial favor toward implied rights of action, I would still disagree with the majority for the simple reason that a "settled construction of an important federal statute should not be disturbed unless and until Congress so decides." *Reves* v. *Ernst & Young*, 494 U. S. 56, 74 (1990) (STEVENS, J., concurring). See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 733 (1975) (the "longstanding acceptance by the courts" and "Congress' failure to reject" rule announced in landmark Court of Appeals decision favored retention of the rule).[6] A policy of respect for consistent judicial and administrative interpretations leaves it to elected representatives to assess settled law and to evaluate the merits and demerits of changing it.[7] Even when there is no affirmative evidence of ratification, the Legislature's failure to reject a consistent judicial or administrative construction counsels hesitation from a court asked to invalidate it. Cf. *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 406 (1932) (Brandeis, J., dissenting). Here, however, the available evidence suggests congressional *approval* of aider and abettor liability in private § 10(b) actions. In its comprehensive revision of the Exchange Act in 1975, Congress left untouched the sizable body of case law approving aiding and abetting liability in private actions under § 10(b) and Rule 10b–5.[8] The case for leaving aiding

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[6] None of the cases the majority relies upon to support its strict construction of § 10(b), *ante*, at 173–175, even arguably involved a settled course of lower court decisions. See *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993); *Pinter* v. *Dahl*, 486 U. S. 622, 635, n. 12 (1988); *Chiarella* v. *United States*, 445 U. S. 222, 229, n. 11 (1980); *Sante Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 475–476, n. 15 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 191–192, n. 7 (1976).

[7] Of course, when a decision of this Court upsets settled law, Congress may step in to reinstate the old law, cf. Securities Exchange Act § 27A, as added by Pub. L. 102–242, § 476, 105 Stat. 2236, 2387, codified at 15 U. S. C. § 78aa–1 (1988 ed., Supp. IV) (providing that relevant state limitations period should govern actions pending when *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), came down). However, we should not lightly heap new tasks on the Legislature's already full plate. Moreover, congressional efforts to address the problems posed by judicial decisions that disrupt settled law frequently create special difficulties of their own. See, *e. g., Plaut* v. *Spendthrift Farm, Inc.*, 1 F. 3d 1487 (CA6 1993) (holding § 27A unconstitutional), cert. pending, No. 93–1121; *Pacific Mut. Life Ins. Co.* v. *First RepublicBank Corp.*, 997 F. 2d 39 (CA5 1993) (upholding it), cert. granted, 510 U. S. 1039 (1994). See also *Rivers* v. *Roadway Express, Inc., post*, at 304–313.

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[8] By 1975, the renowned decision in *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F. Supp. 673, 680 (ND Ind. 1966), had been on the books almost a decade and several Courts of Appeals had recognized aider and abettor liability in private actions brought under § 10(b) and Rule 10b–5. See *Kerbs* v. *Fall River Industries, Inc.*, 502 F. 2d 731, 739–740 (CA10 1974); *Landy* v. *FDIC*, 486 F. 2d 139, 162–163 (CA3 1973), cert. denied, 416 U. S. 960 (1974); *Strong* v. *France*, 474 F. 2d 747, 752 (CA9 1973); *Buttrey* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F. 2d 135, 144 (CA7), cert. denied, 396 U. S. 838 (1969). See also *Lanza* v. *Drexel & Co.*, 479 F. 2d 1277, 1301, 1303–1304 (CA2 1973) (en banc); Ruder, Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, *In Pari Delicto*, Indemnification, and Contribution, 120 U. Pa. L. Rev. 597, 620–638 (1972). We have noted the significance of the 1975 amendments in another case involving a "consistent line of judicial decisions" on the implied right of action under § 10(b) and Rule 10b–5. See *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 384–386 (1983). Those amendments emerged from " 'the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's.' " *Id.*, at 385, n. 20 (quoting H. R. Conf. Rep. No. 94–229, p. 91 (1975)).

Congress' more recent visits to the securities laws also suggest approval of the aiding and abetting theory in private § 10(b) actions. The House Report accompanying an aiding and abetting provision of the 1983 Insider Trading Sanctions Act, see 15 U. S. C. § 78u(d)(2)(A) (1982 ed., Supp. V), contains an approving reference to "judicial application of the concept of aiding and abetting liability to achieve the remedial purposes of the securities laws," H. R. Rep. No. 98–355, p. 10 (1983), and notes with favor *Rolf* v. *Blyth, Eastman Dillon & Co.*, 570 F. 2d 38 (CA2), cert. denied, 439 U. S. 1039 (1978), which affirmed a judgment against an aider and abettor in a private action under § 10(b) and Rule 10b–5. Moreover, § 5 of the and abetting liability intact draws further strength from the fact that the SEC itself has consistently understood § 10(b) to impose aider and abettor liability since shortly after the rule's promulgation. See *Ernst & Young,* 494 U. S., at 75 (STEVENS, J., concurring). In short, one need not agree as an original matter with the many decisions recognizing the private right against aiders and abettors to concede that the right fits comfortably within the statutory scheme, and that it has become a part of the established system of private enforcement. We should leave it to Congress to alter that scheme.

The Court would be on firmer footing if it had been shown that aider and abettor liability "detracts from the effectiveness of the 10b–5 implied action or interferes with the effective operation of the securities laws." See *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau,* 508 U. S. 286, 298 (1993). However, the line of decisions recognizing aider and abettor liability suffers from no such infirmities. The language of both § 10(b) and Rule 10b–5 encompasses "any person" who violates the Commission's antifraud rules, whether "directly or indirectly"; we have read this "broad" language "not technically and restrictively, but flexibly to effectuate its remedial purposes." *Affiliated Ute Citizens of Utah* v. *United States,* 406 U. S. 128, 151 (1972). In light of the encompassing language of § 10(b), and its acknowledged purpose to strengthen the antifraud remedies of the common law, it was certainly no wild extrapolation for courts to conclude that aiders and abettors should be subject to the

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Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. 100–704, 102 Stat. 4681, contains an express "acknowledgment," *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau,* 508 U. S. 286, 294 (1993), of causes of action "implied from a provision of this title," 15 U. S. C. § 78t–1(d).

private action under § 10(b).[9] Allowing aider and abettor claims in private § 10(b) actions can hardly be said to impose unfair legal duties on those whom Congress has opted to leave unregulated: Aiders and abettors of § 10(b) and Rule 10b–5 violations have always been subject to *criminal* liability under 18 U. S. C. § 2. See 15 U. S. C. § 78ff (criminal liability for willful violations of securities statutes and rules promulgated under them). Although the Court canvasses policy arguments against aider and abettor liability, *ante*, at 188–190, it does not suggest that the aiding and abetting theory has had such deleterious consequences that we should dispense with it on those grounds.[10] The agency charged with primary responsibility for enforcing the securities laws does not perceive such drawbacks, and urges retention of the private right to sue aiders and abettors. See Brief for SEC as *Amicus Curiae* 5–17.

As framed by the Court's order redrafting the questions presented, this case concerns only the existence and scope of aiding and abetting liability in suits brought by private parties under § 10(b) and Rule 10b–5. The majority's rationale, however, sweeps far beyond even those important issues. The majority leaves little doubt that the Exchange Act does not even permit the *SEC* to pursue aiders and abettors in civil enforcement actions under § 10(b) and Rule 10b–5. See *ante*, at 177 (finding it dispositive that "the text of the 1934 Act does not itself reach those who aid and abet a § 10(b) violation"). Aiding and abetting liability has a long pedigree in civil proceedings brought by the SEC under § 10(b) and Rule 10b–5, and has become an important part of the SEC's enforcement arsenal.[11] Moreover, the majority's approach to aiding and abetting at the very least casts serious doubt, both for private and SEC actions, on *other* forms of secondary liability that, like the aiding and abetting theory, have long been recognized by the SEC and the courts but are not expressly spelled out in the securities statutes.[12]

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[9] In a similar context we recognized a private right of action against secondary violators of a statutory duty despite the absence of a provision explicitly covering them. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S., at 394 ("Having concluded that exchanges can be held accountable for breaching their statutory duties to enforce their own rules prohibiting price manipulation, it necessarily follows that those persons who are participants in a conspiracy to manipulate the market in violation of those rules are also subject to suit by futures traders who can prove injury from these violations").

[10] Indeed, the Court anticipates, *ante*, at 191, that many aiders and abettors will be subject to liability as primary violators. For example, an accountant, lawyer, or other person making oral or written misrepresentations (or omissions, if the person owes a duty to the injured purchaser or seller, cf. *Dirks* v. *SEC*, 463 U. S. 646, 654–655 (1983)) in connection with the purchase or sale of securities may be liable for a primary violation of § 10(b) and Rule 10b–5. See, *e. g., Akin* v. *Q–L Investments, Inc.*, 959 F. 2d 521, 525–526 (CA5 1992).

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[11] See, *e. g., SEC* v. *Coffey*, 493 F. 2d 1304, 1316 (CA6 1974); Ruder, 120 U. Pa. L. Rev., at 625–626, nn. 124 and 125. The SEC reports that it asserted aiding and abetting claims in 15 percent of its civil enforcement proceedings in fiscal year 1992, and that elimination of aiding and abetting liability would "sharply diminish the effectiveness of Commission actions." Brief for SEC as *Amicus Curiae* 18, n. 15.

[12] The Court's rationale would sweep away the decisions recognizing that a defendant may be found liable in a private action for *conspiring* to violate § 10(b) and Rule 10b–5. See, *e. g., U. S. Industries, Inc.* v. *Touche Ross & Co.*, 854 F. 2d 1223, 1231 (CA10 1988); *SEC* v. *Coffey*, 493 F. 2d 1304, 1316 (CA6 1974); *Ferguson* v. *Omnimedia, Inc.*, 469 F. 2d 194, 197–198 (CA1 1972); *Shell* v. *Hensley*, 430 F. 2d 819, 827, n. 13 (CA5 1970); *Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262, 267, n. 2 (CA7), cert. denied *sub nom. Bard* v. *Dasho*, 389 U. S. 977 (1967). See generally Kuehnle, 14 J. Corp. L., at 343–348. Secondary liability is as old as the implied right of action under § 10(b) itself; the very first decision to recognize a private cause of action under the section and rule, *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (ED Pa. 1946), involved an alleged conspiracy. See also *Fry* v. *Schumaker*, 83 F. Supp. 476, 478 (ED Pa. 1947) (Kirkpatrick, C. J.). In addition, many courts, concluding that § 20(a)'s "controlling person" provisions, 15 U. S. C. § 78t, are not the exclusive source of secondary liability under the Exchange Act, have imposed liability in § 10(b) actions based upon *respondeat superior* and other common-law agency principles. See, *e. g., Hollinger* v. *Titan Capital Corp.*, 914 F. 2d 1564, 1576–1577, and

The principle the Court espouses today—that liability may not be imposed on parties who are not within the scope of § 10(b)'s plain language—is inconsistent with long-established SEC and judicial precedent.

As a general principle, I agree, "the creation of new rights ought to be left to legislatures, not courts." *Musick, Peeler,* 508 U. S., at 291. But judicial restraint does not always favor the narrowest possible interpretation of rights derived from federal statutes. While we are now properly reluctant to recognize private rights of action without an instruction from Congress, we should also be reluctant to lop off rights of action that have been recognized for decades, even if the judicial methodology that gave them birth is now out of favor. Caution is particularly appropriate here, because the judicially recognized right in question accords with the longstanding construction of the agency Congress has assigned to enforce the securities laws. Once again the Court has refused to build upon a "'secure foundation . . . laid by others,'" *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 222 (1989) (STEVENS, J., dissenting) (quoting B. Cardozo, The Nature of the Judicial Process 149 (1921)).

I respectfully dissent.

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n. 27 (CA9 1990) (en banc) (citing and following decisions to this effect from six other Circuits). See generally Kuehnle, 14 J. Corp. L., at 350–376. These decisions likewise appear unlikely to survive the Court's decision. See *ante,* at 184.

McDERMOTT, INC. *v.* AMCLYDE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 92–1479. Argued January 11, 1994—Decided April 20, 1994

When petitioner McDermott, Inc., attempted to use a crane purchased from respondent AmClyde to move an offshore oil and gas production platform, a prong of the crane's hook broke, damaging both the platform and the crane itself. The malfunction may have been caused by McDermott's negligent operation of the crane, by AmClyde's faulty design or construction, by a defect in the hook supplied by respondent River Don Castings, Ltd., or by one or more of the three companies that supplied supporting steel slings. McDermott brought suit in admiralty against respondents and the three "sling defendants," but settled with the latter for $1 million. The case then went to trial, and the jury assessed McDermott's loss at $2.1 million, allocating 32% of the damages to AmClyde, 38% to River Don, and 30% jointly to petitioner and the sling defendants. Among other things, the District Court entered judgment against AmClyde for $672,000 (32% of $2.1 million) and against River Don for $798,000 (38% of $2.1 million). Holding that the contract between McDermott and AmClyde precluded any recovery against the latter and that the trial judge had improperly denied respondents' motion to reduce the judgment against them *pro tanto* by the settlement amount, the Court of Appeals reversed the judgment against AmClyde entirely and reduced the judgment against River Don to $470,000, which it computed by determining McDermott's full award to be $1.47 million ($2.1 million minus 30% attributed to McDermott/sling defendants), and then by deducting the $1 million settlement.

Held: The nonsettling defendants' liability should be calculated with reference to the jury's allocation of proportionate responsibility, not by giving them a credit for the dollar amount of the settlement. Pp. 207–221.

(a) Supported by a consensus among maritime nations, scholars, and judges, the Court, in *United States* v. *Reliable Transfer Co.,* 421 U. S. 397, 409, adopted a rule requiring that damages in an admiralty suit be assessed on the basis of proportionate fault when such an allocation can reasonably be made. No comparable consensus has developed with respect to the issue in this case. Although it is generally agreed that nonsettling joint tortfeasors are entitled to a credit when the plaintiff settles with one of the other defendants, there is a divergence of views about how that credit should be determined. The American Law Institute (ALI) has identified three principal alternatives for doing so: (1) *pro tanto* setoff with a right of contribution against the settling defendant; (2) *pro tanto* setoff without contribution; and (3) the "proportionate share approach," whereby the settlement diminishes the injured party's claim against nonsettling tortfeasors by the amount of the equitable share of the obligation of the settling tortfeasor. Pp. 207–211.

(b) ALI Option 3, the proportionate share approach, best answers the question presented in this case. Option 1 is clearly inferior to the other two alternatives, because it discourages settlement and leads to unnecessary ancillary litigation. As between Options 2 and 3, the proportionate share approach is more consistent with the proportionate fault approach of *Reliable Transfer, supra,* because a litigating defendant ordinarily pays only its proportionate share of the judgment. Conversely, Option 2, even when supplemented with hearings to determine the good faith of the settlement, is likely to lead to inequitable apportionments of liability, contrary to *Reliable Transfer.* Moreover, although Option 2 sometimes seems to better promote settlement than Option 3, it must ultimately be seen to have no clear advantage in that regard, since, under the proportionate share approach, factors such as the parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships should ensure nontrial dispositions in the vast majority of cases. Similarly, Option 2 has no clear advantage with respect to judicial economy unless it is adopted without the requirement of a good-faith hearing, a course which no party or *amicus* advocates because of the large potential for unfairness to nonsettling defendants, who might have to pay more than their fair share of the damages. Pp. 211–217.

(c) Respondents' argument that the proportionate share approach violates the "one satisfaction rule"—which, as applied by some courts, reduces a plaintiff's recovery against a nonsettling defendant in order to ensure that the plaintiff does not secure more than necessary to compensate him for his loss—is rejected, since the law contains no rigid rule against overcompensation, and, indeed, several doctrines, such as the collateral benefits rule, recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation. The argument that the proportionate share approach is inconsistent with *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256, is also rejected, since *Edmonds* was primarily a statutory construction case, did not address the question at issue here or even involve a settlement, and can be read as merely reaffirming the well-established principle of joint and several liability, which was in no way abrogated by *Reliable Transfer* and is not in tension with the proportionate share approach. Pp. 218–221.

979 F. 2d 1068, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Arden J. Lea argued the cause for petitioner. With him on the briefs was *R. Jeffrey Bridger.*

William K. Kelley argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Acting Deputy Solicitor General Kneedler, Richard A. Olderman,* and *David V. Hutchinson.*

Robert E. Couhig, Jr., argued the cause for respondents. With him on the brief was *Thomas G. O'Brien.**

JUSTICE STEVENS delivered the opinion of the Court.

A construction accident in the Gulf of Mexico gave rise to this admiralty case. In advance of trial, petitioner, the plaintiff, settled with three of the defendants for $1 million. Respondents, however, did not settle, and the case went to trial. A jury assessed petitioner's loss at $2.1 million and allocated 32% of the damages to respondent AmClyde and 38% to respondent River Don Castings, Ltd. (River Don). The question presented is whether the liability of the nonsettling defendants should be calculated with reference to the jury's allocation of proportionate responsibility, or by giving the nonsettling defendants a credit for the dollar amount of the settlement. We hold that the proportionate approach is the correct one.

I

Petitioner McDermott, Inc., purchased a specially designed, 5,000-ton crane from AmClyde.[1] When petitioner first used the crane in an attempt to move an oil and gas production platform—the "Snapper deck"—from a barge to a structural steel base affixed to the floor of the Gulf of Mexico, a prong of the crane's main hook broke, causing massive damage to the deck and to the crane itself. The malfunction may have been caused by petitioner's negligent operation of the crane, by AmClyde's faulty design or construction, by a defect in the hook supplied by River Don, or by one or more of the three companies (the "sling defendants") that supplied the supporting steel slings.[2]

**Warren B. Daly, Jr.,* and *George W. Healy III* filed a brief for the Maritime Law Association of the United States as *amicus curiae* urging reversal.

[1] "AmClyde," formerly known as "Clyde Iron," is a division of AMCA International, Inc.

Invoking the federal court's jurisdiction under 28 U. S. C. §§1332 and 1333(1),[3] petitioner brought suit against AmClyde and River Don and the three sling defendants. The complaint sought a recovery for both deck damages and crane damages. On the eve of trial, petitioner entered into a settlement with the sling defendants. In exchange for $1 million, petitioner agreed to dismiss with prejudice its claims against the sling defendants, to release them from all liability for either deck or crane damages, and to indemnify them against any contribution action. The trial judge later ruled that petitioner's claim for crane damages was barred by *East River S. S. Corp.* v. *Transamerica Delaval Inc.*, 476 U. S. 858 (1986).

In its opening statement at trial, petitioner McDermott "accepted responsibility for any part the slings played in causing the damage."[4] *McDermott, Inc.* v. *Clyde Iron*, 979

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[2] The three sling defendants, sometimes also described as the "settling defendants," were International Southwest Slings, Inc.; British Ropes, Ltd.; and Hendrik Veder B. V.

[3] Section 1333(1) provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[4] McDermott's motive in taking upon itself responsibility for the sling defendant's fault is obscure. Perhaps it thought doing so would prevent a contribution action against the sling defendants and thus relieve McDermott of its indemnity obligation.

F. 2d 1068, 1070 (CA5 1993). The jury found that the total damages to the deck amounted to $2.1 million and, in answer to special interrogatories, allocated responsibility among the respective parties: 32% to AmClyde, 38% to River Don, and 30% jointly to McDermott and the sling defendants.[5] The court denied a motion by respondents to reduce the judgment *pro tanto* by the $1 million settlement, and entered judgment against AmClyde for $672,000 (32% of $2.1 million) and against River Don for $798,000 (38% of $2.1 million). Even though the sum of those judgments plus the settlement proceeds exceeded the total damages found by the jury, the District Court concluded that petitioner had not received a double recovery because the settlement had covered both crane damages and deck damages.[6]

The Court of Appeals held that a contractual provision precluded any recovery against AmClyde and that the trial judge had improperly denied a *pro tanto* settlement credit. It reversed the judgment against AmClyde entirely and reduced the judgment against River Don to $470,000. It arrived at that figure by making two calculations. First, it determined that petitioner's "full damage[s] award is $1.47 million ($2.1 million jury verdict less 30% attributed to McDermott/sling defendants)." 979 F. 2d, at 1081. Next, it deducted the "$1 million received in settlement to reach

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[5] The special interrogatory treated McDermott and the sling defendants as a single entity and called for a percentage figure that covered them both. This combined treatment reflected McDermott's acceptance of responsibility for the damages caused by the sling defendants.

[6] The trial judge also noted that "[t]o hold as the defendants request would result in the settling defendants, who were at the most thirty percent (30%) responsible for the accident (no separate contributory negligence, if any, finding was made as to McDermott), paying One Million Dollars ($1,000,000.00) while the defendants who insisted on a trial and were found to be seventy percent (70%) liable would pay Four Hundred and Seventy Thousand Dollars ($470,000.00) between them. That is unjust . . . ." App. to Pet. for Cert. A-52 to A-53.

$470,000." *Ibid.* It treated this figure as the maximum that could be recovered from the nonsettling defendants. Because it was less than River Don's liability as found by the jury (38% of $2.1 million or $798,000), it directed the entry of judgment against River Don in that amount. *Ibid.*

Because we have not previously considered how a settlement with less than all of the defendants in an admiralty case should affect the liability of nonsettling defendants, and because the Courts of Appeals have adopted different approaches to this important question, we granted certiorari. 509 U. S. 921 (1993).

II

Although Congress has enacted significant legislation in the field of admiralty law,[7] none of those statutes provides us with any "policy guidance" or imposes any limit on our authority to fashion the rule that will best answer the question presented by this case. See *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 27 (1990). We are, nevertheless, in familiar waters because "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime." *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 409 (1975).

In the *Reliable Transfer* case we decided to abandon a rule that had been followed for over a century in assessing damages when both parties to a collision are at fault. We replaced the divided damages rule, which required an equal division of property damage whatever the relative degree of fault may have been, with a rule requiring that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made. Although the old rule avoided the difficulty of determining comparative degrees of negligence, we concluded that it was "unnecessarily crude and inequitable" and that "[p]otential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." *Id.*, at 407. Thus the interest in certainty and simplicity served by the old rule was outweighed by the interest in fairness promoted by the proportionate fault rule.

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[7] See, *e. g.*, Longshore and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950; Death on the High Seas Act, 46 U. S. C. §§ 761–768; Public Vessels Act, 46 U. S. C. §§ 781–790.

Our decision in *Reliable Transfer* was supported by a consensus among the world's maritime nations and the views of respected scholars and judges. See *id.*, at 403–405. No comparable consensus has developed with respect to the issue in the case before us today. It is generally agreed that when a plaintiff settles with one of several joint tortfeasors, the nonsettling defendants are entitled to a credit for that settlement. There is, however, a divergence among respected scholars and judges about how that credit should be determined. Indeed, the American Law Institute (ALI) has identified three principal alternatives and, after noting that "[e]ach has its drawbacks and no one is satisfactory," decided not to take a position on the issue. Restatement (Second) of Torts § 886A, pp. 343–344 (1977). The ALI describes the three alternatives as follows:

> "(1) The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation." *Id.*, at 343.
>
> "(2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution." *Ibid.* (As in alternative (1), the amount of the injured party's claim against the other tortfeasors is cal-

> culated by subtracting the amount of the settlement from the plaintiff's damages.)
>
> "(3) The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the equitable share of the obligation of the released tortfeasor." *Id.*, at 344.[8]

The first two alternatives involve the kind of "*pro tanto*" credit that respondents urge us to adopt. The difference between the two versions of the *pro tanto* approach is the recognition of a right of contribution against a settling defendant in the first but not the second. The third alternative, supported by petitioner, involves a credit for the settling defendants' "proportionate share" of responsibility for the total obligation. Under this approach, no suits for contribution from the settling defendants are permitted, nor are they necessary, because the nonsettling defendants pay no more than their share of the judgment.

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[8] The three alternatives sketched by the ALI correspond to three detailed model Acts proposed by the National Conference of Commissioners on Uniform State Laws. Uniform Contribution Among Tortfeasors Act (1939 Act), 12 U. L. A. 57–59 (1975) (ALI Option 1); Revised Uniform Contribution Among Tortfeasors Act (1955 Revised Act), *id.*, at 63–107 (ALI Option 2); Uniform Comparative Fault Act (1977 Act), 12 U. L. A. 45–61 (1993 Supp.) (ALI Option 3). Although the three ALI options are the most plausible, a number of others are possible. So, for example, in addition to arguing for the *pro tanto* rule, respondents suggest that we consider a rule that allows the nonsettling defendants to elect before trial either the *pro tanto* or the proportionate share rule. Although respondents claim support for their proposal in Texas and New York statutes, those statutes enact regimes quite different from that proposed by respondents. Texas Civ. Prac. & Rem. Code Ann. § 33.012(b) (Supp. 1994) (nonsettling defendant can choose *pro tanto* rule or reduction of damages by fixed proportion of total damages without regard to relative fault); N. Y. Gen. Oblig. Law § 15–108 (McKinney 1989) (*pro tanto* rule or proportionate share rule, whichever favors nonsettling defendants). We are unwilling to consider a rule that has yet to be applied in any jurisdiction.

The proportionate share approach[9] would make River Don responsible for precisely its share of the damages, $798,000 (38% of $2.1 million).[10] A simple application of the *pro tanto* approach would allocate River Don $1.1 million in damages ($2.1 million total damages minus the $1 million settlement).[11] The Court of Appeals, however, made a different calculation. Because McDermott "accepted responsibility for any part the sling played in causing the damage," 979 F. 2d, at 1070, the Court of Appeals treated the 30% of liability apportioned to "McDermott/sling defendants" as if that 30% had been caused solely by McDermott's own negligence. *Id.*, at 1081. The Court of Appeals, therefore, gave River Don a double credit, first reducing the total loss by the McDermott/sling defendants' proportionate share and then applying the full *pro tanto* reduction to that amount. This double credit resulted in an award of only $470,000 ($2.1 million minus 30% of $2.1 million minus $1 million).[12]

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[9] In this opinion, we use the phrase "proportionate share approach" to denote ALI Option 3. We have deliberately avoided use of the term "pro rata," which is often used to describe this approach, see, *e. g.*, T. Schoenbaum, Admiralty and Maritime Law §4-15, p. 153 (1987), because that term is also used to describe an equal allocation among all defendants without regard to their relative responsibility for the loss. See *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F. 2d 1020, 1028 (CA2 1992); Silver, Contribution Under the Securities Acts: The Pro Rata Method Revisited, 1992/1993 Ann. Survey Am. L. 273. Others have used different terms to describe the approach adopted here. *Ibid.* ("proportionate method"); Kornhauser & Revesz, Settlements Under Joint and Several Liability, 68 N. Y. U. L. Rev. 427, 438 (1993) ("apportioned share set-off rule"); Polinsky & Shavell, Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis, 33 Stan. L. Rev. 447 (1981) ("claim reduction").

[10] It might be thought that, since AmClyde is immune from damages, River Don's liability should be $1.47 million (McDermott's $2.1 million loss minus 30% of $2.1 million, the share of liability attributed to the settling defendants and McDermott). This calculation would make River Don responsible not only for its own 38% share, but also for the 32% of the damages allocated by the jury to AmClyde. This result could be seen as mandated by principles of joint and several liability and by *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256 (1979). See *infra*, at 220-221. Nevertheless, McDermott has not requested that River Don pay any more than its 38% share of the damages. AmClyde is immune from damages because its contract with McDermott provided that free replacement of defective parts "shall constitute fulfillment of all liabilities . . . whether based upon Contract, tort, strict liability or otherwise." 979 F. 2d 1068, 1075 (CA5 1993) (emphasis omitted). The best way of viewing this contractual provision is as a quasi settlement in advance of any tort claims. Viewed as such, the proportionate credit in this case properly takes into account both the 30% of liability apportioned to the settling defendants (and McDermott) and the 32% allocated to AmClyde. This leaves River Don with $798,000 or 38% of the damages.

[11] For simplicity, we ignore AmClyde, which was found to be immune from damages by the Court of Appeals. *Id.*, at 1075-1076. No party

III

In choosing among the ALI's three alternatives, three considerations are paramount: consistency with the proportionate fault approach of *United States* v. *Reliable Transfer*, 421 U. S. 397 (1975), promotion of settlement, and judicial economy. ALI Option 1, *pro tanto* setoff with right of contribution against the settling defendant, is clearly inferior to the other two, because it discourages settlement and leads to unnecessary ancillary litigation. It discourages settlement, because settlement can only disadvantage the settling defendant.[13] If a defendant makes a favorable settlement, in

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appeals that holding. Although AmClyde spent a considerable amount replacing the defective hook, River Don does not argue that that amount should be included in the calculation of its liability.

[12] Whether the Court of Appeals correctly applied the *pro tanto* rule in the context of McDermott's acceptance of responsibility for the sling damages is a difficult question. Fortunately, since we adopt the proportionate share approach, we need not answer it.

[13] Uniform Contribution Among Tortfeasors Act § 4 (1955 Revised Act), Commissioners' Comment, 12 U. L. A. 99 (1975); Kornhauser & Revesz, 68 N. Y. U. L. Rev., at 474; Polinsky & Shavell, 33 Stan. L. Rev., at 458–459, 462, 463. This argument assumes, in accordance with the law of most jurisdictions, that a settling defendant ordinarily has no right of contribution against other defendants. See Uniform Contribution Against Tortfeasors Act § 1(d), 12 U. L. A. 63 (1975); Uniform Comparative Fault Act § 4(b), 12 U. L. A. 54 (1993 Supp.); Restatement (Second) of Torts § 886A(2) and Comment *f*, pp. 337, 339 (1977).

which it pays less than the amount a court later determines is its share of liability, the other defendant (or defendants) can sue the settling defendant for contribution. The settling defendant thereby loses the benefit of its favorable settlement. In addition, the claim for contribution burdens the courts with additional litigation. The plaintiff can mitigate the adverse effect on settlement by promising to indemnify the settling defendant against contribution, as McDermott did here. This indemnity, while removing the disincentive to settlement, adds yet another potential burden on the courts, an indemnity action between the settling defendant and plaintiff.

The choice between ALI Options 2 and 3, between the *pro tanto* rule without contribution against the settling tortfeasor and the proportionate share approach, is less clear. The proportionate share rule is more consistent with *Reliable Transfer*, because a litigating defendant ordinarily pays only its proportionate share of the judgment. Under the *pro tanto* approach, however, a litigating defendant's liability will frequently differ from its equitable share, because a settlement with one defendant for less than its equitable share requires the nonsettling defendant to pay more than its share.[14] Such deviations from the equitable apportionment of damages will be common, because settlements seldom reflect an entirely accurate prediction of the outcome of a trial. Moreover, the settlement figure is likely to be significantly less than the settling defendant's equitable share of the loss, because settlement reflects the uncertainty of trial and provides the plaintiff with a "war chest" with which to finance the litigation against the remaining defendants. Courts and legislatures have recognized this potential for unfairness and have required "good-faith hearings" as a remedy.[15] When such hearings are required, the settling defendant is protected against contribution actions only if it shows that the settlement is a fair forecast of its equitable share of the judgment.[16] Nevertheless, good-faith hearings cannot fully remove the potential for inequitable allocation of liability.[17] First, to serve their protective function effectively, such hearings would have to be minitrials on the merits, but in practice they are often quite cursory.[18] More fundamentally, even if the judge at a good-faith hearing were able to make a perfect forecast of the allocation of liability at trial, there might still be substantial unfairness when the plaintiff's success at trial is uncertain.[19] In sum, the *pro tanto* approach, even when supplemented with good-faith hearings, is likely to lead to inequitable apportionments of liability, contrary to *Reliable Transfer.*

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[14] Suppose, for example, that a plaintiff sues two defendants, each equally responsible, and settles with one for $250,000. At trial, the nonsettling defendant is found liable, and plaintiff's damages are assessed at $1 million. Under the *pro tanto* rule, the nonsettling defendant would be liable for 75% of the damages ($750,000, which is $1 million minus $250,000). The litigating defendant is thus responsible for far more than its proportionate share of the damages. It is also possible for the *pro tanto* rule to result in the nonsettlor paying less than its apportioned share, if, as in this case, the settlement is greater than the amount later determined by the court to be the settlors' equitable share. For a more complex example illustrating the potential for unfairness under the *pro tanto* rule when the parties are not equally at fault, see Kornhauser & Revesz, 68 N. Y. U. L. Rev., at 455–456 (*pro tanto* rule can lead to defendant responsible for 75% of damages paying only 37.5% of loss, while 25% responsible defendant pays 31.25%).

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[15] *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F. 2d 1020 (CA2 1992); *Miller* v. *Christopher*, 887 F. 2d 902, 906–907 (CA9 1989); *Tech-Bilt, Inc.* v. *Woodward-Clyde & Assocs.*, 38 Cal. 3d 488, 698 P. 2d 159 (1985); Uniform Contribution Among Tortfeasors Act §4 (1955 Revised Act), 12 U. L. A. 98 (1975) (enacted as statute law in 19 States, 12 U. L. A. 81 (1993 Supp.)).

[16] *Tech-Bilt, Inc.*, 38 Cal. 3d, at 499, 698 P. 2d, at 166; *Miller*, 887 F. 2d, at 907; *In re Masters*, 957 F. 2d, at 1031; but see *Noyes* v. *Raymond*, 28 Mass. App. 186, 190, 548 N. E. 2d 196, 199 (1990) (judge in good-faith hearing should not scrutinize the settlement amount, but merely look for "collusion, fraud, dishonesty, and other wrongful conduct").

[17] *Franklin* v. *Kaypro Corp.*, 884 F. 2d 1222, 1230 (CA9 1989).

[18] *Tech-Bilt*, 38 Cal. 3d, at 500, 698 P. 2d, at 167 ("[T]he determination of good faith can be made by the court on the basis of affidavits"); *TBG Inc.* v. *Bendis*, 811 F. Supp. 596, 605, n. 17, 608 (Kan. 1992) (no "mini trial" required; settlement amount is "best available measure of liability").

The effect of the two rules on settlements is more ambiguous. Sometimes the *pro tanto* approach will better promote settlement.[20] This beneficial effect, however, is a consequence of the inequity discussed above. The rule encourages settlements by giving the defendant that settles first an opportunity to pay less than its fair share of the damages, thereby threatening the nonsettling defendant with the prospect of paying more than its fair share of the loss. By disadvantaging the party that spurns settlement offers, the *pro tanto* rule puts pressure on all defendants to settle.[21] While public policy wisely encourages settlements, such additional pressure to settle is unnecessary. The parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relationships is sufficient to ensure nontrial dispositions in the vast majority of cases.[22] Under the proportionate share approach, such factors should ensure a similarly high settlement rate. The additional incentive to settlement provided by the *pro tanto* rule comes at too high a price in unfairness.[23] Furthermore, any conclusion that the *pro tanto* rule generally encourages more settlements requires many simplifying assumptions, such as low litigation costs. Recognition of the reality that a host of practical

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[19] Suppose again, as in footnote 14, that plaintiff sues two equally culpable defendants for $1 million and settles with one for $250,000. At the good-faith hearing, the settling defendant persuasively demonstrates that the settlement is in good faith, because it shows that its share of liability is 50% and that plaintiff has only a 50% chance of prevailing at trial. The settlement thus reflects exactly the settling defendant's expected liability. If plaintiff prevails at trial, the nonsettling defendant will again be liable for 75% of the judgment even though its equitable share is only 50%. The only way to avoid this inequity is for the judge at the good-faith hearing to disallow any settlement for less than $500,000, that is, any settlement which takes into account the uncertainty of recovery at trial. Such a policy, however, carries a grave cost. It would make settlement extraordinarily difficult, if not impossible, in most cases. As a result, every jurisdiction that conducts a good-faith inquiry into the amount of the settlement takes into account the uncertainty of recovery at trial. *Miller,* 887 F. 2d, at 907–908; *Tech-Bilt,* 38 Cal. 3d, at 499, 698 P. 2d, at 166; *TBG Inc.,* 811 F. Supp., at 600.

[20] Illustration of the beneficial effects of the *pro tanto* rule requires substantial simplifying assumptions. Suppose, for example, that all parties are risk neutral, that litigation is costless, and that there are only two defendants. In addition, suppose everyone agrees that the damages are $100, that if one defendant is found liable, the other one will also be found liable, and that if the defendants are liable, each will be apportioned 50% of the damages. And suppose, as frequently happens, that the plaintiff is more optimistic about his chances of prevailing than the defendants: Plaintiff thinks his chances of winning are 60%, whereas the defendants think the plaintiff's chances are only 50%. In this case, under the proportionate setoff rule, settlement is unlikely, because the plaintiff would be reluctant to accept less than $30 (60% times 50% of $100) from each defendant, whereas neither defendant would be disposed to offer more than $25 (50% times 50% of $100). On the other hand, under the *pro tanto* rule, the plaintiff would be willing to accept a $25 settlement offer, because he would believe he had a 60% chance of recovering $75 ($100 minus the $25 settlement) at trial from the other defendant. Accepting the $25 settlement offer would give the plaintiff an expected recovery of $70 ($25 plus

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60% of $75), which is more than the $60 (60% of $100) the plaintiff would expect if he went to trial against both defendants. For a more thorough discussion of settlement under the *pro tanto* rule, see Kornhauser & Revesz, 68 N. Y. U. L. Rev., at 447–465.

[21] See H. Hovenkamp, Economics and Federal Antitrust Law § 14.6, p. 377 (1985), summarizing Easterbrook, Landes, & Posner, Contribution among Antitrust Defendants: A Legal and Economic Analysis, 23 J. Law & Econ. 331, 353–360 (1980).

[22] Less than 5% of cases filed in federal court end in trial. Administrative Office of United States Courts, Annual Report of the Director, 186, 217 (1991) (Of 211,713 civil cases terminated between July 1, 1990, and June 30, 1991, only 11,024 involved trials). Although some of the nontrial terminations are the result of pretrial adjudications, such as summary judgments and contested motions to dismiss, the bulk of the nontrial terminations reflect settlements. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161, 163–164 (1986).

[23] *United States* v. *Reliable Transfer Co.*, 421 U. S. 397, 408 (1975) ("Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations").

considerations may be more significant than stark hypotheticals persuades us that the *pro tanto* rule has no clear advantage in promoting settlements.[24]

The effect of the two rules on judicial economy is also ambiguous. The *pro tanto* rule, if adopted without the requirement of a good-faith hearing, would be easier to administer, because the relative fault[25] of the settling defendant would not have to be adjudicated either at a preliminary hearing or at trial. Nevertheless, because of the large potential for unfairness, no party or *amicus* in this suit advocates the *pro tanto* rule untamed by good-faith hearings. Once the *pro tanto* rule is coupled with a good-faith hearing, however, it is difficult to determine whether the *pro tanto* or proportionate share approach best promotes judicial economy. Under either approach, the relative fault of the parties will have to be determined. Under the *pro tanto* approach, the settling defendant's share of responsibility will have to be ascertained at a separate, pretrial hearing. Under the proportionate share approach, the allocation will take place at trial. The *pro tanto* approach will, therefore, save judicial time only if the good-faith hearing is quicker than the allocation of fault at trial. Given the cursory nature of most good-faith hearings, this may well be true. On the other hand, there is reason to believe that reserving the apportionment of liability for trial may save more time. First, the remaining defendant (or defendants) may settle before trial, thus making any determination of relative culpability unnecessary. In addition, the apportionment of damages required by the proportionate share rule may require little or no additional trial time. The parties will often need to describe the settling defendant's role in order to provide context for the dispute. Furthermore, a defendant will often argue the "empty chair" in the hope of convincing the jury that the settling party was exclusively responsible for the damage. The *pro tanto* rule thus has no clear advantage with respect to judicial economy.[26]

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[24] An excellent discussion of the effect of the various rules on settlement is Kornhauser & Revesz, Settlement Under Joint and Several Liability, 68 N. Y. U. L. Rev. 427 (1993). After considering the effects of strategic behavior, litigation costs, and whether the probabilities of the defendants' being found liable at trial are "independent" or "correlated," they conclude that "neither rule is consistently better than the other." *Id.*, at 492. In addition, in comparing the *pro tanto* and proportionate share rules, they generally assume that the *pro tanto* rule is implemented without good-faith hearings. Good-faith hearings, however, "mak[e] the pro tanto set-off rule relatively less desirable from the perspective of inducing settlements than the apportioned [*i. e.* proportionate] share set-off rule." *Id.*, at 476. Moreover, the *pro tanto* rule contains a unique disincentive to settlement in cases, like this one, in which the settlement covers more items of damage than the litigated judgment. McDermott argued that the settlement covered damage both to the crane and to the deck, whereas the judgment against River Don related only to the deck. The Court of Appeals refused to apportion the settlement between deck damages and crane damages and to credit River Don only with that portion related to deck damages. 979 F. 2d, at 1080. This refusal to apportion will greatly discourage settlement, because parties like McDermott will be unable to recover their full damages if they settle with one party.

[25] By referring to the relative fault of the parties, we express no disapproval of the lower courts' use of relative "causation" to allocate damages. See 979 F. 2d, at 1081–1082.

In sum, although the arguments for the two approaches are closely matched, we are persuaded that the proportionate share approach is superior, especially in its consistency with *Reliable Transfer.*

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[26] A further cost of the *pro tanto* rule would be incurred in cases in which the settlement covered more items of damage than the judgment. See n. 24, *supra.* To avoid discouraging settlement, the judge would have to figure out what proportion of the settlement related to damages covered by the judgment and what percentage related to damages covered only by the settlement. Presumably this allocation would be done by comparing the settling defendant's liability for the damages to be covered by the judgment to those not so covered. Ascertaining the liability of a settling defendant for damages not otherwise litigated at trial would be at least as difficult as ascertaining an absent defendant's responsibility for damages already the subject of litigation.

IV

Respondents advance two additional arguments against the proportionate share approach: that it violates the "one satisfaction rule" and that it is inconsistent with *Edmonds* v. *Compagnie Generale Transatlantique,* 443 U. S. 256 (1979).

In the 19th and early 20th centuries, the "one satisfaction rule" barred a plaintiff from litigating against one joint tortfeasor, if he had settled with and released another.[27] This version of the one satisfaction rule has been thoroughly repudiated.[28] Respondents do not ask that the one satisfaction rule be applied with its original strictness, but rather in the milder form in which some courts still invoke it to reduce a plaintiff's recovery against a nonsettling defendant in order to ensure that the plaintiff does not secure more than necessary to compensate him for his loss.[29] As a preliminary matter, it is far from clear that there was any danger of supercompensatory damages here. First, there is the question of the crane damages, which were not covered by the judgment against River Don. In addition, even limiting consideration to deck damages, the jury fixed plaintiff's losses at $2.1 million. Plaintiff received $1 million in settlement from the sling defendants. Under the proportionate share approach, plaintiff would receive an additional $798,000 from River Don. In total, plaintiff would recover only $1.798 million, over $300,000 less than its damages. The one satisfaction rule comes into play only if one assumes that the percent share of liability apportioned to McDermott and the sling defendants really represented McDermott's contributory fault, and that it would be overcompensatory for McDermott to receive more than the percentage of the total loss allocated to the defendants, here $1.47 million (70% of $2.1 million).

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[27] *Conway* v. *Pottsville Union Traction Co.,* 253 Pa. 211, 97 A. 1058 (1916); *Rogers* v. *Cox,* 66 N. J. L. 432, 50 A. 143 (1901); W. Prosser, Law of Torts § 109, pp. 1105–1111 (1941).

[28] W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 49, pp. 333–334 (5th ed. 1984); Restatement (Second) of Torts § 885(1), Comment *b,* at 334.

[29] *Rose* v. *Associated Anesthesiologists,* 501 F. 2d 806, 809 (CADC 1974); *Sanders* v. *Cole Municipal Finance,* 489 N. E. 2d 117, 120 (Ind. App. 1986).

Even if the Court of Appeals were correct in finding that the proportionate share approach would overcompensate McDermott, we would not apply the one satisfaction rule. The law contains no rigid rule against overcompensation. Several doctrines, such as the collateral benefits rule,[30] recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation. In this case, any excess recovery is entirely attributable to the fact that the sling defendants may have made an unwise settlement. It seems probable that in most cases in which there is a partial settlement, the plaintiff is more apt to accept *less* than the proportionate share that the jury might later assess against the settling defendant, because of the uncertainty of recovery at the time of settlement negotiations and because the first settlement normally improves the plaintiff's litigating posture against the nonsettlors. In such cases, the entire burden of applying a proportionate share rule would rest on the plaintiff, and the interest in avoiding overcompensation would be absent. More fundamentally, we must recognize that settlements frequently result in the plaintiff's getting more than he would have been entitled to at trial. Because settlement amounts are based on rough estimates of liability, anticipated savings in litigation costs, and a host of other factors, they will rarely match exactly the amounts a trier of fact would have set. It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that, unlike the *pro tanto* rule, it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.

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[30] See 4 F. Harper, F. James, & O. Gray, Law of Torts § 25.22 (2d ed. 1986) (injured person can recover full damages from tortfeasor, even when he has already been made whole by insurance or other compensatory payment); Restatement (Second) of Torts § 920A(2) (1977). The one satisfaction rule once applied to compensatory payments by nonparties as well, thus preventing or diminishing recovery in many situations in which the collateral benefits rules would now permit full judgment against the tortfeasor. W. Prosser, Law of Torts § 109, pp. 1105–1107 (1941).

Respondents also argue that the proportionate share rule is inconsistent with *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U. S. 256 (1979). In that case, we refused to reduce the judgment against a shipowner by the proportionate fault attributed to a stevedore whose liability was limited by the Longshoremen's and Harbor Workers' Compensation Act. Instead, the Court allowed the plaintiff to collect from the shipowner the entirety of his damages, after adjusting for the plaintiff's own negligence. There is no inconsistency between that result and the rule announced in this opinion. *Edmonds* was primarily a statutory construction case and related to special interpretive questions posed by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act. Both parties acknowledge that this case must be resolved by judge-made rules of law. Moreover, *Edmonds* did not address the issue in this case, the effect of a settlement on nonsettling defendants. Indeed, there was no settlement in that case. Instead, one can read that opinion as merely reaffirming the well-established principle of joint and several liability. As the Court pointed out, that principle was in no way abrogated by *Reliable Transfer*'s proportionate fault approach. *Edmonds*, 443 U. S., at 271–272, n. 30. In addition, as the Commissioners on Uniform State Laws have noted, there is no tension between joint and several liability and a proportionate share approach to settlements.[31] Joint and several liability applies when there has been a judgment against multiple defendants. It can result in one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency. When the limitations on the plaintiff's recovery arise from outside forces, joint and several liability makes the other defendants, rather than an innocent plaintiff, responsible for the shortfall. *Ibid.*[32] Unlike the rule in *Edmonds*, the proportionate share rule announced in this opinion applies when there has been a settlement. In such cases, the plaintiff's recovery against the settling defendant has been limited not by outside forces, but by its own agreement to settle. There is no reason to allocate any shortfall to the other defendants, who were not parties to the settlement. Just as the other defendants are not entitled to a reduction in liability when the plaintiff negotiates a generous settlement, see *supra*, at 219–220, so they are not required to shoulder disproportionate liability when the plaintiff negotiates a meager one.

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[31] Uniform Comparative Fault Act § 2, Comment "Joint and Several Liability and Equitable Shares of the Obligation," 12 U. L. A. 51 (1993 Supp.).

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[32] See also Uniform Comparative Fault Act § 2 (reallocation of insolvent defendant's equitable share), *id.*, at 50.

BOCA GRANDE CLUB, INC. *v.* FLORIDA POWER & LIGHT CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93–180. Argued January 11, 1994—Decided April 20, 1994

Held: The judgment is vacated and the case remanded for further proceedings consistent with *McDermott, Inc.* v. *AmClyde, ante,* p. 202, which adopts the proportionate share rule, under which actions for contribution against settling defendants are neither necessary nor permitted. Pp. 222–223.

990 F. 2d 606, vacated and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

David F. Pope argued the cause for petitioner. With him on the briefs was *Jack C. Rinard.*

Ronald J. Mann argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler,* and *Richard A. Olderman.*

Stuart C. Markman argued the cause for respondent. With him on the briefs were *James E. Felman, C. Steven Yerrid,* and *Christopher S. Knopik.**

JUSTICE STEVENS delivered the opinion of the Court.

We granted certiorari, 509 U. S. 953 (1993), to consider the question whether, in an action against several alleged joint

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*Briefs of *amicus curiae* urging reversal were filed for the Maritime Law Association of the United States by *Warren B. Daly, Jr.,* and *George W. Healy III;* and for the National Association of Securities and Commercial Law Attorneys by *William S. Lerach, Leonard B. Simon,* and *Kevin P. Roddy.*

Kathryn A. Oberly, Carl D. Liggio, Jon N. Ekdahl, Harris J. Amhowitz, Howard J. Krongard, Edwin D. Scott, and *Eldon Olson* filed a brief for Arthur Andersen & Co. et al. as *amici curiae* urging affirmance.

tortfeasors under general maritime law, the plaintiff's settlement with one defendant bars a claim for contribution brought by nonsettling defendants against the settling defendant. Because the opinion that we announce today in *McDermott, Inc.* v. *AmClyde, ante,* p. 202, adopts the proportionate share rule, under which actions for contribution against settling defendants are neither necessary nor permitted, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with that opinion.

It is so ordered.

UNITED STATES *v.* IRVINE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92–1546. Argued December 6, 1993—Decided April 20, 1994

As a result of Sally Ordway Irvine's 1979 disclaimer of five-sixteenths of her interest in the corpus of a recently terminated trust that had been created by her grandfather in 1917, each of her five children received one-sixteenth of her share of the distributed trust principal. Her disclaimer was effective under Minnesota law even though she had learned of her contingent interest in the trust at least as early as 1931 when she became 21, but the Internal Revenue Service determined that the disclaimer brought about a gratuitous transfer that was subject to federal gift tax under Internal Revenue Code §§2501(a)(1) and 2511(a). Mrs. Irvine died after she paid the tax and accrued interest, and respondents, representing her estate, filed this refund action. Arguing that the transaction was not excepted from gift tax under Treasury Regulation §25.2511–1(c)(2) (Regulation), the Government relied on *Jewett* v. *Commissioner*, 455 U. S. 305, in which this Court construed the 1958 version of the Regulation to provide that the disclaimer of a remainder interest in a trust effects a taxable gift to the beneficiary of the disclaimer unless the disclaimant acts within a reasonable time after learning of the transfer that created the interest being disclaimed. Respondents attempted to distinguish *Jewett* as having dealt with a trust established in 1939, after the creation of the gift tax by the Revenue Act of 1932 (Act). The District Court ruled for respondents on cross-motions for summary judgment. The Court of Appeals affirmed, holding that the Regulation's express terms rendered it inapplicable to the trust in question; that state law therefore governed, and the federal gift tax did not apply because Mrs. Irvine's disclaimer was indisputably valid under state law; and that taxation of the transfer effected by the disclaimer would violate the Act's prohibition of retroactive gift taxation.

Held: The disclaimer of a remainder interest in a trust is subject to federal gift taxation when the creation of the interest (but not the disclaimer) occurred before enactment of the gift tax. Pp. 232–242.

(a) Although the Internal Revenue Code's gift tax provisions embrace all gratuitous transfers of property having significant value, the Regulation affords an exception by providing that a disclaimer of property transferred from a decedent's estate does not result in a gift if it is unequivocal and effective under local law, and made "within a reasonable time after knowledge of the existence of the transfer." The *Jewett* Court held that "the transfer" in the 1958 version of the Regulation refers to the creation of the interest being disclaimed, with the "reasonable time" therefore beginning to run upon knowledge of the creation of the trust. Pp. 232–234.

(b) If the Regulation applies to Mrs. Irvine's disclaimer, her act resulted in taxable gifts. The knowledge and capacity to act, which are presupposed by the requirement that a tax-free disclaimer be made within a reasonable time of the disclaimant's knowledge of the transfer of the interest to her, were present in this instance at least as early as Mrs. Irvine's 21st birthday in 1931. Although there is no bright-line rule for timeliness in the absence of a statute or regulation providing one, Mrs. Irvine's delay for at least 47 years in making her disclaimer could not possibly be thought reasonable. Pp. 234–236.

(c) Respondents' arguments that the Regulation is inapposite by its own terms to the facts of this case need not be resolved here, for the result of the Regulation's inapplicability would not be, as respondents claim, a freedom from gift taxation on a theory of borrowed state law. State property transfer rules do not translate into federal taxation rules because the principles underlying the two look to different objects. In order to defeat the claims of a disclaimant's creditors in the disclaimed property, the state rules apply the legal fiction that an effective disclaimer of a testamentary gift cancels the transfer to the disclaimant *ab initio* and substitutes a single transfer from the original donor to the disclaimant's beneficiary. In contrast, Congress enacted the gift tax as a supplement to the federal estate tax and a means of curbing estate tax avoidance. Since the reasons for defeating a disclaimant's creditors would furnish no reasons for defeating the gift tax, the Court in *Jewett*, *supra*, at 317, was undoubtedly correct to hold that Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the Act. Absent such a legal fiction, the federal gift tax is not struck blind by a disclaimer. Pp. 236–240.

(d) Taxation of the transfer following Mrs. Irvine's disclaimer would not violate § 501(b) of the Act, which provided that it would "not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Section 501 merely prohibited application of the gift tax statute to transfers antedating the enactment of the Act; it did not prohibit taxation where, as here, interests created before the Act were transferred after enactment. Pp. 240–241.

981 F. 2d 991, reversed.

Souter, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, O'Connor, Kennedy, Thomas, and Ginsburg, JJ., joined, and in which Scalia, J., joined except as to Part III–A. Scalia, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 242. Blackmun, J., took no part in the decision of the case.

Kent L. Jones argued the cause for the United States. With him on the briefs were *Solicitor General Days, Acting Assistant Attorney General Paup, Deputy Solicitor General Wallace, Jonathan S. Cohen,* and *Teresa E. McLaughlin.*

Phillip H. Martin argued the cause for respondents. With him on the briefs were *Mary J. Streitz, Carol A. Peterson,* and *Cole Oehler.**

Justice Souter delivered the opinion of the Court.

In *Jewett* v. *Commissioner,* 455 U. S. 305 (1982), we construed the 1958 version of Treasury Regulation § 25.2511–1(c) to provide that the disclaimer of a remainder interest in a trust effects a taxable gift unless the disclaimant acts within a reasonable time after learning of the transfer that created the interest. This case presents the question whether the rule is the same, under current Treasury Regulation § 25.2511–1(c)(2) (Regulation), when the creation of the interest (but not the disclaimer) occurred before enactment of the federal gift tax provisions of the Revenue Act of 1932. We hold that it is.

I

In 1917, Lucius P. Ordway established an irrevocable *inter vivos* family trust, with his wife and their children as primary concurrent life income beneficiaries, to be succeeded by unmarried surviving spouses of the children and by grandchildren. The trust was to terminate upon the death of the last surviving primary income beneficiary, at which time the corpus would be distributed to Mr. Ordway's surviving grandchildren and the issue of any grandchildren who had died before termination. When the trust terminated on June 27, 1979, the corpus was subject to division into 13 equal shares among 12 grandchildren living and the issue of one who had died. Prior to distribution, on August 23, 1979, one of the grandchildren, Sally Ordway Irvine, filed a disclaimer of five-sixteenths of her interest in the trust principal. Mrs. Irvine had learned of her contingent interest in the trust at least as early as 1931 when she reached the age of 21, and she had begun receiving a share of the annual trust income after her father's death in 1966. Her disclaimer was nonetheless effective under a Minnesota statute on the books at the time, which permitted the disclaimer of a future interest at any time within six months of the event finally identifying the disclaimant and causing her interest to become indefeasibly fixed.[1] As a result of her disclaimer, each of Mrs. Irvine's five children received one-sixteenth of her share of the distributed trust principal.

**Burton G. Ross, Cynthia S. Rosenblatt,* and *Robert P. Reznick* filed a brief for John G. Ordway, Jr., et al. as *amici curiae* urging affirmance.

Geoffrey J. O'Connor filed a brief for the estate of Helen W. Halbach et al. as *amici curiae.*

Mrs. Irvine reported the disclaimer in a federal gift tax return, but did not treat it as resulting in a taxable gift. The Commissioner of Internal Revenue determined on audit that the disclaimer indirectly transferred property by gift within the meaning of Internal Revenue Code of 1986 §§2501(a)(1)[2] and 2511(a),[3] and was not excepted from gift tax under Treas. Reg. § 25.2511–1(c)[4] because it was not made "within a reasonable time after [Mrs. Irvine's] knowledge" of her grandfather's transfer creating her interest in the trust estate. Mrs. Irvine responded with an amended return treating the disclaimer as a taxable gift, on which she paid the resulting tax of $7,468,671, plus $2,086,627.51 in accrued interest on the deficiency.[5] She then claimed a refund of the tax and interest, which the Internal Revenue Service denied.

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[1] Minn. Stat. §501.211, subd. 3 (1978), repealed by 1989 Minn. Laws, ch. 340, art. 1, §77 (and replaced by Minn. Stat. §501B.86, subd. 3 (1992) (changing the time permitted for disclaiming to nine months, effective January 1, 1990)).

[2] "A tax . . . is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by any individual resident or nonresident." 26 U. S. C. §2501(a)(1).

[3] "Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible . . . ." 26 U. S. C. §2511(a).

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[4] The following is the relevant text of the 1958 regulation then in effect: "The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512–8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable *[sic]* and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. . . ." Treas. Reg. § 25.2511–1(c), 26 CFR § 25.2511–1(c) (1959).

[5] Mrs. Irvine was also assessed additional gift tax and penalties in connection with an unrelated gift made in 1980 because her amended gift tax return for the third quarter of 1979 reduced the amount of unified credit available to her in the following year. See 26 U. S. C. § 2505 (1988 ed. and Supp. IV). That assessment is not at issue here.

After Mrs. Irvine's death in 1987, respondents, representing her estate, filed this action for refund of the tax and interest in the United States District Court for the District of Minnesota. The Government continued to maintain that the partial disclaimer brought about a transfer subject to federal gift tax because Mrs. Irvine had not made it, as the Regulation requires, "within a reasonable time after knowledge of the [earlier] transfer" that created her interest in the trust estate. The Government relied on *Jewett* v. *Commissioner,* 455 U. S. 305 (1982), in which this Court held that the "transfer" referred to in Treas. Reg. §25.2511–1(c), 26 CFR §25.2511–1(c) (1959) (promulgated in 1958), knowledge of which starts the clock ticking, occurs at the creation of the interest being disclaimed, not when its extent is finally ascertained or it becomes possessory. *Jewett, supra,* at 311–312.

Respondents tried to distinguish *Jewett* as having dealt with a trust established in 1939, after the creation of the gift tax by the Revenue Act of 1932 (Act), whereas the Ordway trust had been created before the Act, in 1917. Respondents also argued that the "reasonable time" limitation did not apply because the pre-Act, 1917 transfer creating the trust was not a "taxable transfer" of an interest, absent which the Regulation was inapplicable.[6] On cross-motions

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[6] The 1958 version of the Regulation was in force throughout the period from Mrs. Irvine's disclaimer to her unsuccessful claim for a refund. The parties agree, however, that the current (1986) version of the Regulation supersedes the earlier version and governs this case. See 26 U. S. C. §7805(b) (Secretary of the Treasury "may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect"); *Automobile Club of Mich.* v. *Commissioner,* 353 U. S. 180, 184 (1957) (Treasury Regulations may be retroactively applied unless doing so constitutes an abuse of the Secretary's discretion).

The relevant regulation is now Treas. Reg. §25.2511–1(c)(2), 26 CFR §25.2511–1(c)(2) (1993), which provides in relevant part:

"In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of prop-for summary judgment, the District Court held that imposing the gift tax on Mrs. Irvine's disclaimer would amount to retroactive application of the gift tax in violation of the Act's provision that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. The District Court cited *Ordway* v. *United States*, 89–1 USTC ¶ 13,802 (1989), in which the United States District Court for the Southern District of Florida had reached the same conclusion, on virtually identical facts, in a case involving a partial disclaimer by another beneficiary of the Ordway trust.

A divided panel of the Court of Appeals for the Eighth Circuit reversed. 936 F. 2d 343 (1991). It rejected the view that the Regulation is inapplicable to a trust created before enactment of the gift tax statute simply because the Regulation reaches only "'*taxable transfers* creating an interest in the person disclaiming made before January 1, 1977.'" *Id.*, at 347 (emphasis in original). The Court of Appeals held that the transfer creating the trust was "tax-

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erty transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. In the absence of the facts to the contrary, if a person fails to refuse to accept the transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law."

able," relying on the provision of Treas. Reg. §25.2518-2(c)(3) that "'a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift.'" 936 F. 2d, at 347–348. The court adopted the reasoning of its sister court for the Eleventh Circuit in *Ordway* v. *United States*, 908 F. 2d 890 (1990), which held that a "taxable transfer" occurs within the meaning of the Regulation whenever there is "'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." *Id.*, at 895 (citation omitted). Applying the Regulation, the Court of Appeals for the Eighth Circuit held that Mrs. Irvine's disclaimer was subject to gift tax because she did not make it within a reasonable time after she learned of her interest in the trust. Finally, the divided panel also upheld application of the Act against the claim of retroactivity, holding it to be irrelevant that the trust antedated the 1932 enactment of the Act, since the tax was being imposed on the transfer brought about by the 1979 disclaimer, not on the *inter vivos* transfer that created the trust in 1917. 936 F. 2d, at 346.

Respondents' suggestion for rehearing en banc was granted, however, and the panel opinion was vacated. Unlike the panel, the en banc court affirmed the District Court, holding the Regulation inapplicable because its terms expressly limit its scope to "taxable transfers . . . made before January 1, 1977." 981 F. 2d 991 (CA8 1992). The creation of the Ordway trust in 1917 was not a "taxable transfer," the court reasoned, because the federal gift tax provisions had yet to be enacted: "It is fundamental that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made. No such federal tax existed on January 16, 1917, when . . . Mrs. Irvine's interest was created." *Id.*, at 994. Given the inapplicability of the Regulation and its "reasonable time" requirement for tax-free disclaimer, the majority held that state law governed the effect of a disclaimer for federal gift tax purposes. See *id.*, at 996 (citing *Hardenbergh* v. *Commissioner*, 198 F. 2d 63 (CA8), cert. denied, 344 U. S. 836 (1952)); 981 F. 2d, at 998 (concurring opinion). Because Mrs. Irvine's disclaimer was indisputably valid under Minnesota law, the court held that the federal gift tax did not apply. Finally, the majority rejected the panel's analysis of retroactive application, indicating that taxation of the transfer effected by the disclaimer would violate the Act's prohibition of retroactive gift taxation. *Id.*, at 994.

In a concurring opinion, *id.*, at 996–998, Judge Loken also concluded the Regulation was inapplicable, not because of its limitation to "taxable transfers," but because it is limited to interests in "property transferred from a decedent . . . by the decedent's will or by the law of descent and distribution," whereas the Ordway trust came from an *inter vivos* transfer. Judge Loken shared the majority view, however, that because the Regulation was inapplicable, the federal gift tax consequences of the disclaimer were a function of state law. The dissent took the position of the majority in the panel opinion, and of the Eleventh Circuit in *Ordway* v. *United States, supra.* See 981 F. 2d, at 998–1002.

The conflict prompted us to grant certiorari to determine whether a disclaimer made after enactment of the gift tax statute, of an interest created before enactment, is necessarily free of any consequent federal gift taxation. 508 U. S. 971 (1993). We hold that it is not, and reverse.

II

The Internal Revenue Code of 1986 taxes "the transfer of property by gift," 26 U. S. C. §2501(a)(1),[7] "whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible," §2511(a).[8] We have repeatedly emphasized that this comprehensive language was chosen to embrace all gratuitous transfers, by whatever means, of property and property rights of significant value. See, *e. g.*, *Dickman* v. *Commissioner*, 465 U. S. 330, 333–335 (1984); *Jewett* v. *Commissioner*, 455 U. S., at 309–310; *Smith* v. *Shaughnessy*, 318 U. S. 176, 180 (1943). We held in *Jewett*, *supra*, at 310, that "the statutory language . . . unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust," the practical effect of such a transfer being "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of [her] bounty . . . ."

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[7] See n. 2, *supra.*

[8] See n. 3, *supra.*

Treasury Reg. § 25.2511–1(c)(1)[9] restates the gift tax's broad scope by providing that the tax is payable on "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed . . . ." The Regulation (subsection 1(c)(2)), on the other hand, affords an exception to the general rule of taxability, by providing that a disclaimer of property transferred by a decedent's will or the law of descent and distribution does not result in a gift if it is unequivocal and effective under local law, and made "within a reasonable time after knowledge of the existence of the transfer." As already noted, the *Jewett* Court held that "the transfer" in the 1958 version of the Regulation refers to the creation of the interest being disclaimed, with the "reasonable time" therefore beginning to run upon knowledge of the creation of the trust. See *supra,* at 229.

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[9] "The gift tax also applies to gifts indirectly made. Thus, any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax. See further § 25.2512–8 relating to transfers for insufficient consideration. However, in the case of a taxable transfer creating an interest in the person disclaiming made after December 31, 1976, this paragraph (c)(1) shall not apply to the donee if, as a result of a qualified disclaimer by the donee, the property passes to a different donee. Nor shall it apply to a donor if, as a result of a qualified disclaimer by the donee, a completed transfer of an interest in property is not effected. See section 2518 and the corresponding regulations for rules relating to a qualified disclaimer." Treas. Reg. § 25.2511–1(c)(1), 26 CFR § 25.2511–1(c)(1) (1993).

III

A

On one point there cannot be any serious dispute, for it is clear that if the Regulation applies to Mrs. Irvine's disclaimer, her act resulted in taxable gifts. The knowledge and capacity to act, which are presupposed by the requirement that a tax-free disclaimer be made within a reasonable time of the disclaimant's knowledge of the transfer of the interest to her, were present in this instance at least as early as Mrs. Irvine's 21st birthday in 1931.[10] We need not decide whether a disclaimer good for gift tax purposes could be required to have been made before enactment of the gift tax, for Mrs. Irvine did not disclaim shortly after enactment of the Act, and the timeliness determination in this case would be the same whether the reasonable time was calculated from Mrs. Irvine's first knowledge of the interest (1931) or from the enactment of the federal gift tax statute (1932). Moreover, we understand the Government to have conceded that it would not have contested the timeliness of a disclaimer made within a reasonable time after the enactment of the Act. See Tr. of Oral Arg. 12.

The determination of the amount of "reasonable time" that remained after Mrs. Irvine learned of the interest and reached majority status must be based upon the gift tax's purpose to curb avoidance of the estate tax. We have already observed, *supra,* at 233, that "the practical effect of [a disclaimer like this one is] to reduce the expected size of [the disclaimant's] taxable estate and to confer a gratuitous benefit upon the natural objects of [her] bounty . . . ." *Jewett,* 455 U. S., at 310. Accordingly, as the Court said in *Jewett,* " '[a]n important, if not the main, purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property *inter vivos* which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death.' " *Ibid.* (quoting *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 44 (1939)). Hence the capacious language of Internal Revenue Code §§2501(a)(1) and 2511(a), which encompasses all gratuitous transfers of property and property rights of significant value. See *supra,* at 232–233.

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[10] Arguably, occasion and capacity occurred under applicable Minnesota law in 1928 when Mrs. Irvine became 18 years old, the age of majority for women at the time. 1866 Minn. Gen. Stat., ch. 59, § 2; see *Vlasek* v. *Vlasek,* 204 Minn. 331, 331–332, 283 N. W. 489, 490 (1939).

"[T]he passage of time is crucial to the scheme of the gift tax." *Jewett, supra,* at 316, n. 17 (internal quotation marks and citation omitted). The opportunity to disclaim, and thereby to avoid gift as well as estate taxation, should not be so long as to provide a virtually unlimited opportunity to consider estate planning consequences. While a decision to disclaim even at the earliest opportunity may be made with appreciation of potential estate tax consequences, the passage of time puts the prospective disclaimant in a correspondingly superior position to determine whether her need to enjoy the property (and incur a tax for a subsequent gift of it or an increased estate tax if she retains it) outweighs the favorable estate and gift tax consequences of a disclaimer. Although there is no bright-line rule for timeliness in the absence of a statute or regulation providing one, Mrs. Irvine's delay for at least 47 years after the clock began running, until she reached age 68, could not possibly be thought reasonable. By the date of her disclaimer, Mrs. Irvine was in a position to make a fairly precise determination of the advantage to be gained by a transfer diminishing her estate and its eventual taxation. If her decision were treated as timely, the requirement for a timely election would have no bite at all.

B

Respondents would avoid this result on two alternative grounds. They argue first that by its own terms, the Regulation does not apply on the facts of this case, with the consequence that taxability under the Internal Revenue Code turns on the efficacy of the disclaimer under state law. Second, respondents argue that even if the disclaimer would result in an otherwise taxable transfer in the absence of the governing Regulation, the tax on transfer of an interest created by an instrument antedating the enactment of the gift tax statute would be barred by the statutory prohibition of retroactive application.

1

The question of the Regulation's applicability under its own terms need not be resolved here, for the result of its inapplicability would not be freedom from gift taxation on a theory of borrowed state law or on any other rationale. The arguments for inapplicability may therefore be shortly stated, each having been raised at one point or another in the prior litigation of this case.

The first argument turns on the Regulation's application to disclaimers of interests created by what it terms "taxable transfers," a phrase that on its face presupposes some source of taxability for the transfer. There was, however, no gift tax when the trust, including its remainder interests, was created in 1917, and the gift tax provisions of the Act did not render preenactment transfers taxable.[11] The language is, to say the least, troublesome to the Government's position that the Regulation applies. The Government responds to the trouble by citing Treas. Reg. § 25.2518–2(c)(3)[12] (adopted in 1986, as was the Regulation), which deals with the new regime (not applicable here) for disclaimers of interests created after December 31, 1976,[13] and defines "taxable transfer" for its purposes as covering transfers on which no tax is actually imposed (*e. g.*, because a gift is chargeable against the current lifetime exemption, 26 U. S. C. § 2503(b)). If this definition is thought to beg the question, the Government falls back to the argument that the predecessor regulation was not limited in application to interests derived from taxable transfers, and there was no intent in 1986 to narrow the scope covered by the 1958 version of the Regulation in any such way.

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[11] See Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245 (nonretroactivity provision).

The second argument rests on the Regulation's provision that "the transfer" to which it applies is subject to a timely, tax-free disclaimer "whether the transfer is effected by the decedent's will or by the law of descent and distribution," but only "where the law governing the administration of the decedent's estate" gives the recipient of the transferred interest a right to refuse it.[14] As against these descriptions of the transfer's testamentary character, the text says nothing indicating that a taxable transfer from anyone other than a decedent may create an interest subject to a disclaimer free of gift tax. If the text is given its strict reading, then, it has no application to the interest in question here, which came into being not from a decedent's transfer by will or from application of the law of descent and distribution, but from Mr. Ordway's transfer during his lifetime, creating an irrevocable *inter vivos* trust.[15]

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[12] Treasury Reg. § 25.2518–2(c)(3), 26 CFR § 25.2518–2(c)(3) (1993), provides in relevant part: "With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift."

[13] Under the new regime, tax-free disclaimers of interests created by post-1976 transfers may generally be made within nine months after the disclaimant has learned of the interest and reached the age of 21. See 26 U. S. C. § 2518; Treas. Reg. §§ 25.2518–1, 25.2518–2, 26 CFR §§ 25.2518–1, 25.2518–2 (1993).

[14] See n. 6, *supra.*

2

Even assuming the soundness of one or both of these arguments that the Regulation is inapposite, however, the disclaimer would not escape federal gift taxation by reference to state law rules giving effect to the disclaimer as causing a transfer to the beneficiary next in line. Any such reasoning would run counter to our holding in *Jewett.* In rejecting the argument that the 1958 version of the Regulation was being applied retroactively to the taxpayer's disadvantage in that case, the *Jewett* Court repudiated the "assumption that [the taxpayer] had a 'right' to renounce the interest without tax consequences that was 'taken away' by the 1958 Regulation. [The taxpayer] never had such a right." *Jewett,* 455 U. S., at 317. Only then did the *Jewett* Court go on to determine that the disclaimer at issue did not fall within the exemption from the gift tax provided by the Regulation, and was consequently taxable. *Id.,* at 312–316. The Court followed the general and longstanding rule in federal tax cases that although state law creates legal interests and rights in property, federal law determines whether and to what extent those interests will be taxed. See, *e. g., Burnet* v. *Harmel,* 287 U. S. 103, 110 (1932); *Morgan* v. *Commissioner,* 309 U. S. 78, 80–81 (1940); *United States* v. *Mitchell,* 403 U. S. 190, 197 (1971). The Court put it this way in *United States* v. *Pelzer,* 312 U. S. 399, 402–403 (1941):

> "[T]he revenue laws are to be construed in the light of their general purpose to establish a nationwide scheme of taxation uniform in its application. Hence their pro-

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[15] In direct contrast, the disclaimed interest in *Jewett* was created by a testamentary trust, and the disclaimer therefore involved "property transferred from a decedent . . . by the decedent's will . . . ." Treas. Reg. § 25.2511–1(c)(2), 26 CFR § 25.2511–1(c)(2) (1993). See *Jewett* v. *Commissioner,* 455 U. S. 305, 306 (1982).

> visions are not to be taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law."

Cases like *Jewett* and this one illustrate as well as any why it is that state property transfer rules do not translate into federal taxation rules. Under state property rules, an effective disclaimer of a testamentary gift[16] is generally treated as relating back to the moment of the original transfer of the interest being disclaimed, having the effect of canceling the transfer to the disclaimant *ab initio* and substituting a single transfer from the original donor to the beneficiary of the disclaimer. See, *e. g.*, *Schoonover* v. *Osborne*, 193 Iowa 474, 478, 187 N. W. 20, 22 (1922); *Seifner* v. *Weller*, 171 S. W. 2d 617, 624 (Mo. 1943); *Albany Hosp.* v. *Hanson*, 214 N. Y. 435, 445, 108 N. E. 812, 815 (1915); *Burritt* v. *Silliman*, 13 N. Y. 93, 97–98 (1855); *Perkins* v. *Isley*, 224 N. C. 793, 798, 32 S. E. 2d 588, 591 (1945); see also 3 American Law of Property § 14.15 (A. Casner ed. 1952). Although a state-law right to disclaim with such consequences might be thought to follow from the common-law principle that a gift is a bilateral transaction, requiring not only a donor's intent to give, but also a donee's acceptance, see, *e. g.*, *Wallace* v. *Moore*, 219 Ga. 137, 139, 132 S. E. 2d 37, 39 (1963); *Gottstein* v. *Hedges*, 210 Iowa 272, 275, 228 N. W. 93, 94 (1929); *Pirie* v. *Le Saulnier*, 161 Wis. 503, 507, 154 N. W. 993, 994 (1915); *Blanchard* v. *Sheldon*, 43 Vt. 512, 514 (1871), state-law tolerance for delay in disclaiming reflects a less theoretical concern. An impor-

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[16] See *Brown* v. *Routzahn*, 63 F. 2d 914, 916 (CA6 1933); 3 American Law of Property § 14.15 (A. Casner ed. 1952). As to interests created by intestate succession, state laws generally refused to give effect to disclaimers; the traditional rule is that "title to the property of an intestate passes by force of the rules of law . . . and that those so entitled by law have no power to prevent the vesting of title in themselves." *Hardenbergh* v. *Commissioner*, 198 F. 2d 63, 66 (CA8), cert. denied, 344 U. S. 836 (1952) (citations omitted).

tant consequence of treating a disclaimer as an *ab initio* defeasance is that the disclaimant's creditors are barred from reaching the disclaimed property. See, *e. g.*, *Gottstein* v. *Hedges*, *supra*. The *ab initio* disclaimer thus operates as a legal fiction obviating a more straightforward rule defeating the claims of a disclaimant's creditors in the property disclaimed.

The principles underlying the federal gift tax treatment of disclaimers look to different objects, however. As we have already stated, Congress enacted the gift tax as a supplement to the estate tax and a means of curbing estate tax avoidance. See *supra*, at 234–235. Since the reasons for defeating a disclaimant's creditors would furnish no reasons for defeating the gift tax as well, the *Jewett* Court was undoubtedly correct to hold that Congress had not meant to incorporate state-law fictions as touchstones of taxability when it enacted the Act. Absent such a legal fiction, the federal gift tax is not struck blind by a disclaimer. And as we have already stated, *supra*, at 233, without the exception afforded in the Regulation,[17] the gift tax statute provides a general rule of taxability for disclaimers such as Mrs. Irvine's.

IV

Presumably to ward off any attack on the federal gift tax resting on the possibility that its retroactive application would violate due process, see *Untermyer* v. *Anderson*, 276 U. S. 440 (1928), § 501(b) of the Act provided that it would "not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. The same provision has in substance been carried forward to this day.[18] Respondents argue that even if the Regulation applies, or taxation would otherwise be authorized, taxation of the transfer following Mrs. Irvine's disclaimer would violate this limitation. The language that respondents use to frame this claim reveals the flaw in their position. Respondents argue that "[t]he government's interpretation of the 1986 Regulation to apply to interests created before enactment of the Act [*i. e.*, to result in taxability] would be a retroactive application of the Act clearly contrary to Congressional intent." Brief for Respondents 26. But § 501 merely prohibited application of the gift tax statute to transfers antedating the enactment of the Act; it did not prohibit taxation when interests created before the Act were transferred after enactment. Such postenactment transfers are all that happened on the occasion of Mrs. Irvine's disclaimer. The critical events, the transfers of fractional portions of Mrs. Irvine's remainder to her children, occurred after enactment of the gift tax, though the interests transferred were created before that date. To argue otherwise, that the transfer to be taxed antedated the Act, would be to cling to the legal fiction that the disclaimer related back to the moment in 1917 when Lucius P. Ordway established the trust. This fiction may be indulged under state law as a device to regulate creditors' rights, but the *Jewett* Court clearly held that Congress enacted no such fantasy.[19] In sum, the retroactivity argument is sufficiently answered by our statement in *United States* v. *Jacobs*, 306 U. S. 363, 367 (1939), that a tax "does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax."

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[17] Respondents challenge the Regulation's validity only insofar as it would allegedly sanction a retroactive application of gift tax. See *infra*, at 241.

[18] See 26 U. S. C. § 2502(b).

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[19] While respondents do not take the further step of arguing that § 502 should be read to embody the fiction because due process would otherwise be violated, they do argue that taxation here would violate due process because Mrs. Irvine would not have been allowed to make a tax-free disclaimer within a reasonable time after adoption of the Act. But those facts are not presented here, as Mrs. Irvine did not disclaim until 1979. See *supra*, at 235.

V

The Commissioner's assessment of federal gift tax on Mrs. Irvine's 1979 disclaimer was authorized by the statute. The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE BLACKMUN took no part in the decision of this case.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I join the judgment of the Court, and its opinion except for Part III–A. It seems to me that the basis for the "reasonable time" limitation in the Regulation cannot be, as the Court says, *ante*, at 235, the need to deprive the beneficiary of "a virtually unlimited opportunity to consider estate planning consequences." Considering estate planning consequences (not a *malum in se*) is nowhere condemned by the tax laws, and I would see no basis for the Treasury Department's arbitrarily declaring a disclaimer to be a gift solely in order to deter such consideration. The Secretary undoubtedly has broad discretion to determine the meaning of the term "transfer" as it is used in the gift tax statute, and undoubtedly may indulge an antagonism to estate planning in choosing among permissible meanings. But "disclaimer after opportunity for estate tax planning" is simply not a permissible meaning.

The justification for the "reasonable time" limitation must, as always, be a textual one. It consists, in my view, of the fact that the failure to make a reasonably prompt disclaimer of a known bequest is an implicit acceptance. *Qui tacet, consentire videtur.* Thus, a later disclaimer, which causes the property to go to someone else by operation of law, is effectively a transfer to that someone else. (The implication from nondisclaimer is much weaker when the interest is a contingent one, but *Jewett* v. *Commissioner*, 455 U. S. 305 (1982), resolved that issue—perhaps incorrectly.) While state disclaimer laws have chosen to override the reasonable implication of nondisclaimer, the Treasury Department regulations correctly (or at least permissibly) conclude that the federal gift tax does not.

LANDGRAF *v.* USI FILM PRODUCTS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 92–757. Argued October 13, 1993—Decided April 26, 1994

After a bench trial in petitioner Landgraf's suit under Title VII of the Civil Rights Act of 1964 (Title VII), the District Court found that she had been sexually harassed by a co-worker at respondent USI Film Products, but that the harassment was not so severe as to justify her decision to resign her position. Because the court found that her employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint. While her appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, § 102 of which includes provisions that create a right to recover compensatory and punitive damages for intentional discrimination violative of Title VII (hereinafter § 102(a)), and authorize any party to demand a jury trial if such damages are claimed (hereinafter § 102(c)). In affirming, the Court of Appeals rejected Landgraf's argument that her case should be remanded for a jury trial on damages pursuant to § 102.

Held: Section 102 does not apply to a Title VII case that was pending on appeal when the 1991 Act was enacted. Pp. 250–286.

(a) Since the President vetoed a 1990 version of the Act on the ground, among others, of perceived unfairness in the bill's elaborate retroactivity provision, it is likely that the omission of comparable language in the 1991 Act was not congressional oversight or unawareness, but was a compromise that made the Act possible. That omission is not dispositive here because it does not establish precisely where the compromise was struck. For example, a decision to reach only cases still pending, and not those already finally decided, might explain Congress' failure to provide in the 1991 Act, as it had in the 1990 bill, that certain sections would apply to proceedings pending on specified preenactment dates. Pp. 250–257.

(b) The text of the 1991 Act does not evince any clear expression of congressional intent as to whether § 102 applies to cases arising before the Act's passage. The provisions on which Landgraf relies for such an expression—§ 402(a), which states that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," and §§ 402(b) and 109(c), which provide for prospective application in limited contexts—cannot bear the heavy weight she would place upon them by negative inference: Her statutory argument would require the Court to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message. Moreover, the relevant legislative history reveals little to suggest that Members of Congress believed that an agreement had been tacitly reached on the controversial retroactivity issue or that *Congress* understood or intended the interplay of the foregoing sections to have the decisive effect Landgraf assigns them. Instead, the history conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct. Pp. 257–263.

(c) In order to resolve the question left open by the 1991 Act, this Court must focus on the apparent tension between two seemingly contradictory canons for interpreting statutes that do not specify their temporal reach: the rule that a court must apply the law in effect at the time it renders its decision, see *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696, 711, and the axiom that statutory retroactivity is not favored, see *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204, 208. Pp. 263–265.

(d) The presumption against statutory retroactivity is founded upon elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. It is deeply rooted in this Court's jurisprudence and finds expression in several constitutional provisions, including, in the criminal context, the *Ex Post Facto* Clause. In the civil context, prospectivity remains the appropriate default rule unless Congress has made clear its intent to disrupt settled expectations. Pp. 265–273.

(e) Thus, when a case implicates a federal statute enacted after the events giving rise to the suit, a court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, there is no need to resort to judicial default rules. Where the statute in question unambiguously applies to preenactment conduct, there is no conflict between the antiretroactivity presumption and the principle that a court should apply the law in effect at the time of decision. Even absent specific legislative authorization, application of a new statute to cases arising before its enactment is unquestionably proper in many situations. However, where the new statute would have a genuinely retroactive effect—*i. e.,* where it would impair rights a party possessed when he acted, increase his liability for past conduct, or impose new duties with respect to transactions already completed—the traditional presumption teaches that the statute does not govern absent clear congressional intent favoring such a result. *Bradley* did not displace the traditional presumption. Pp. 273–280.

(f) Application of the foregoing principles demonstrates that, absent guiding instructions from Congress, § 102 is not the type of provision that should govern cases arising before its enactment, but is instead subject to the presumption against statutory retroactivity. Section 102(b)(1), which authorizes punitive damages in certain circumstances, is clearly subject to the presumption, since the very labels given "punitive" or "exemplary" damages, as well as the rationales supporting them, demonstrate that they share key characteristics of criminal sanctions, and therefore would raise a serious question under the *Ex Post Facto* Clause if retroactively imposed. While the § 102(a)(1) provision authorizing compensatory damages is not so easily classified, it is also subject to the presumption, since it confers a new right to monetary relief on persons like Landgraf, who were victims of a hostile work environment but were not constructively discharged, and substantially increases the liability of their employers for the harms they caused, and thus would operate "retrospectively" if applied to preenactment conduct. Although a jury trial right is ordinarily a procedural change of the sort that would govern in trials conducted after its effective date regardless of when the underlying conduct occurred, the jury trial option set out in § 102(c)(1) must fall with the attached damages provisions because § 102(c) makes a jury trial available only "[i]f a complaining party seeks compensatory or punitive damages." Pp. 280–286.

968 F. 2d 427, affirmed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 286. BLACKMUN, J., filed a dissenting opinion, *post*, p. 294.

Eric Schnapper argued the cause for petitioner. On the briefs were *Paul C. Saunders, Timothy B. Garrigan, Richard T. Seymour,* and *Sharon R. Vinick.*

Solicitor General Days argued the cause for the United States et al. as *amici curiae* urging reversal. On the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Turner, Deputy Solicitor General Wallace, Robert A. Long, Jr., David K. Flynn, Dennis J. Dimsey, Rebecca K. Troth,* and *Donald R. Livingston.*

Glen D. Nager argued the cause for respondents. On the brief was *David N. Shane.**

JUSTICE STEVENS delivered the opinion of the Court.

The Civil Rights Act of 1991 (1991 Act or Act) creates a right to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. See Rev. Stat. § 1977A(a), 42 U. S. C. § 1981a(a) (1988 ed., Supp. IV), as added by § 102 of the 1991 Act, Pub. L. 102–166, 105 Stat. 1072. The Act further provides that any party may demand a trial by jury if such damages are sought.[1] We granted certiorari to decide whether these provisions apply to a Title VII case that was pending on appeal when the statute was enacted. We hold that they do not.

I

From September 4, 1984, through January 17, 1986, petitioner Barbara Landgraf was employed in the USI Film

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*Briefs of *amici curiae* urging reversal were filed for the Asian American Legal Defense and Education Fund et al. by *Denny Chin, Doreena Wong,* and *Angelo N. Ancheta;* and for the National Women's Law Center et al. by *Judith E. Schaeffer* and *Ellen J. Vargyas.*

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations et al. by *James D. Holzhauer, Andrew L. Frey, Kenneth S. Geller, Javier H. Rubinstein, Daniel R. Barney,* and *Kenneth P. Kolson;* and for Motor Express, Inc., by *Alan J. Thiemann.*

Briefs of *amici curiae* were filed for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell,* and *Mona C. Zeiberg;* for the National Association for the Advancement of Colored People et al. by *Marc L. Fleischaker, David L. Kelleher, Steven S. Zaleznick, Cathy Ventrell-Monsees, Steven M. Freeman, Michael Lieberman, Dennis Courtland Hayes, Willie Abrams, Samuel Rabinove,* and *Richard Foltin;* and for Wards Cove Packing Co. by *Douglas M. Fryer, Douglas M. Duncan,* and *Richard L. Phillips.*

[1] See Rev. Stat. § 1977A(c), 42 U. S. C. § 1981a(c) (1988 ed., Supp. IV), as added by § 102 of the 1991 Act. For simplicity, and in conformity with the practice of the parties, we will refer to the damages and jury trial provisions as §§ 102(a) and (c), respectively.

Products (USI) plant in Tyler, Texas. She worked the 11 p.m. to 7 a.m. shift operating a machine that produced plastic bags. A fellow employee named John Williams repeatedly harassed her with inappropriate remarks and physical contact. Petitioner's complaints to her immediate supervisor brought her no relief, but when she reported the incidents to the personnel manager, he conducted an investigation, reprimanded Williams, and transferred him to another department. Four days later petitioner quit her job.

Petitioner filed a timely charge with the Equal Employment Opportunity Commission (EEOC or Commission). The Commission determined that petitioner had likely been the victim of sexual harassment creating a hostile work environment in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, but concluded that her employer had adequately remedied the violation. Accordingly, the Commission dismissed the charge and issued a notice of right to sue.

On July 21, 1989, petitioner commenced this action against USI, its corporate owner, and that company's successor in interest.[2] After a bench trial, the District Court found that Williams had sexually harassed petitioner causing her to suffer mental anguish. However, the court concluded that she had not been constructively discharged. The court said:

> "Although the harassment was serious enough to establish that a hostile work environment existed for Landgraf, it was not so severe that a reasonable person would have felt compelled to resign. This is particularly true in light of the fact that at the time Landgraf resigned from her job, USI had taken steps . . . to eliminate the hostile working environment arising from the sexual harassment. Landgraf voluntarily resigned

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[2] Respondent Quantum Chemical Corporation owned the USI plant when petitioner worked there. Respondent Bonar Packaging, Inc., subsequently purchased the operation.

> from her employment with USI for reasons unrelated to the sexual harassment in question." App. to Pet. for Cert. B–3–4.

Because the court found that petitioner's employment was not terminated in violation of Title VII, she was not entitled to equitable relief, and because Title VII did not then authorize any other form of relief, the court dismissed her complaint.

On November 21, 1991, while petitioner's appeal was pending, the President signed into law the Civil Rights Act of 1991. The Court of Appeals rejected petitioner's argument that her case should be remanded for a jury trial on damages pursuant to the 1991 Act. Its decision not to remand rested on the premise that "a court must 'apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.' *Bradley* [v. *School Bd. of Richmond,* 416 U. S. 696, 711 (1974)]." 968 F. 2d 427, 432 (CA5 1992). Commenting first on the provision for a jury trial in § 102(c), the court stated that requiring the defendant "to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. We apply procedural rules to pending cases, but we do not invalidate procedures followed before the new rule was adopted." *Id.,* at 432–433. The court then characterized the provision for compensatory and punitive damages in § 102 as "a seachange in employer liability for Title VII violations" and concluded that it would be unjust to apply this kind of additional and unforeseeable obligation to conduct occurring before the effective date of the Act. *Id.,* at 433. Finding no clear error in the District Court's factual findings, the Court of Appeals affirmed the judgment for respondents.

We granted certiorari and set the case for argument with *Rivers* v. *Roadway Express, Inc., post,* p. 298. Our order limited argument to the question whether § 102 of the 1991

Act applies to cases pending when it became law. 507 U. S. 908 (1993). Accordingly, for purposes of our decision, we assume that the District Court and the Court of Appeals properly applied the law in effect at the time of the discriminatory conduct and that the relevant findings of fact were correct. We therefore assume that petitioner was the victim of sexual harassment violative of Title VII, but that the law did not then authorize any recovery of damages even though she was injured. We also assume, *arguendo,* that if the same conduct were to occur today, petitioner would be entitled to a jury trial and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer. Thus, the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.

II

Petitioner's primary submission is that the text of the 1991 Act requires that it be applied to cases pending on its enactment. Her argument, if accepted, would make the entire Act (with two narrow exceptions) applicable to conduct that occurred, and to cases that were filed, before the Act's effective date. Although only § 102 is at issue in this case, we preface our analysis with a brief description of the scope of the 1991 Act.

The 1991 Act is in large part a response to a series of decisions of this Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4), 105 Stat. 1071, note following 42 U. S. C. § 1981, expressly identifies as one of the Act's purposes "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." That section, as well as a specific finding in § 2(2), identifies *Wards Cove Packing Co.* v. *Atonio,* 490 U. S. 642

(1989), as a decision that gave rise to special concerns.[3] Section 105 of the Act, entitled "Burden of Proof in Disparate Impact Cases," is a direct response to *Wards Cove.*

Other sections of the Act were obviously drafted with "recent decisions of the Supreme Court" in mind. Thus, § 101 (which is at issue in *Rivers, post,* p. 298) amended the 1866 Civil Rights Act's prohibition of racial discrimination in the "mak[ing] and enforce[ment] [of] contracts," 42 U. S. C. § 1981 (1988 ed., Supp. IV), in response to *Patterson* v. *McLean Credit Union,* 491 U. S. 164 (1989); § 107 responds to *Price Waterhouse* v. *Hopkins,* 490 U. S. 228 (1989), by setting forth standards applicable in "mixed motive" cases; § 108 responds to *Martin* v. *Wilks,* 490 U. S. 755 (1989), by prohibiting certain challenges to employment practices implementing consent decrees; § 109 responds to *EEOC* v. *Arabian American Oil Co.,* 499 U. S. 244 (1991), by redefining the term "employee" as used in Title VII to include certain United States citizens working in foreign countries for United States employers; § 112 responds to *Lorance* v. *AT&T Technologies, Inc.,* 490 U. S. 900 (1989), by expanding employees' rights to challenge discriminatory seniority systems; § 113 responds to *West Virginia Univ. Hospitals, Inc.* v. *Casey,* 499 U. S. 83 (1991), by providing that an award of attorney's fees may include expert fees; and § 114 responds to *Library of Congress* v. *Shaw,* 478 U. S. 310 (1986), by allowing interest on judgments against the United States.

A number of important provisions in the Act, however, were not responses to Supreme Court decisions. For example, § 106 enacts a new prohibition against adjusting test scores "on the basis of race, color, religion, sex, or national origin"; § 117 extends the coverage of Title VII to include the House of Representatives and certain employees of the Legislative Branch; and §§ 301–325 establish special procedures to protect Senate employees from discrimination. Among the provisions that did not directly respond to any Supreme Court decision is the one at issue in this case, § 102.

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[3] Section 2(2) finds that the *Wards Cove* decision "has weakened the scope and effectiveness of Federal civil rights protections," and § 3(2) expresses Congress' intent "to codify" certain concepts enunciated in "Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U. S. 642 (1989)." We take note of the express references to that case because it is the focus of § 402(b), on which petitioner places particular reliance. See *infra,* at 258–263.

Entitled "Damages in Cases of Intentional Discrimination," § 102 provides in relevant part:

> "(a) Right of Recovery.—
>
> "(1) Civil Rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U. S. C. 2000e–5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U. S. C. 2000e–2 or 2000e–3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U. S. C. 1981), the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> . . . . .
>
> "(c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—
>
> "(1) any party may demand a trial by jury."

Before the enactment of the 1991 Act, Title VII afforded only "equitable" remedies. The primary form of monetary relief available was backpay.[4] Title VII's backpay remedy,[5] modeled on that of the National Labor Relations Act, 29 U. S. C. § 160(c), is a "make-whole" remedy that resembles compensatory damages in some respects. See *Albemarle Paper Co.* v. *Moody,* 422 U. S. 405, 418–422 (1975). However, the new compensatory damages provision of the 1991 Act is "in addition to," and does not replace or duplicate, the backpay remedy allowed under prior law. Indeed, to prevent double recovery, the 1991 Act provides that compensatory damages "shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." § 102(b)(2).

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[4] We have not decided whether a plaintiff seeking backpay under Title VII is entitled to a jury trial. See, *e. g., Lytle* v. *Household Mfg., Inc.,* 494 U. S. 545, 549, n. 1 (1990) (assuming without deciding no right to jury trial); *Teamsters* v. *Terry,* 494 U. S. 558, 572 (1990) (same). Because peti-

Section 102 significantly expands the monetary relief potentially available to plaintiffs who would have been entitled to backpay under prior law. Before 1991, for example, monetary relief for a discriminatorily discharged employee generally included "only an amount equal to the wages the employee would have earned from the date of discharge to the date of reinstatement, along with lost fringe benefits such as vacation pay and pension benefits." *United States* v. *Burke,* 504 U. S. 229, 239 (1992). Under § 102, however, a Title VII plaintiff who wins a backpay award may also seek compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." § 102(b)(3). In ad-

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tioner does not argue that she had a right to jury trial even under pre-1991 law, again we need not address this question.

[5] "If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." Civil Rights Act of 1964, § 706(g), as amended, 42 U. S. C. § 2000e–5(g) (1988 ed., Supp. IV).

dition, when it is shown that the employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights," § 102(b)(1), a plaintiff may recover punitive damages.[6]

Section 102 also allows monetary relief for some forms of workplace discrimination that would not previously have justified *any* relief under Title VII. As this case illustrates, even if unlawful discrimination was proved, under prior law a Title VII plaintiff could not recover monetary relief unless the discrimination was also found to have some concrete effect on the plaintiff's employment status, such as a denied promotion, a differential in compensation, or termination. See *Burke*, 504 U. S., at 240. ("[T]he circumscribed remedies available under Title VII [before the 1991 Act] stand in marked contrast not only to those available under traditional tort law, but under other federal anti-discrimination statutes, as well"). Section 102, however, allows a plaintiff to recover in circumstances in which there has been unlawful discrimination in the "terms, conditions, or privileges of employment," 42 U. S. C. § 2000e–2(a)(1),[7] even though the discrimination did not involve a discharge or a loss of pay. In short, to further Title VII's "central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.*, 422 U. S., at 421, § 102 of the

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[6] Section 102(b)(3) imposes limits, varying with the size of the employer, on the amount of compensatory and punitive damages that may be awarded to an individual plaintiff. Thus, the sum of such damages awarded a plaintiff may not exceed $50,000 for employers with between 14 and 100 employees; $100,000 for employers with between 101 and 200 employees; $200,000 for employers with between 200 and 500 employees; and $300,000 for employers with more than 500 employees.

[7] See *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 21 (1993) (discrimination in "terms, conditions, or privileges of employment" actionable under Title VII "is not limited to 'economic' or 'tangible' discrimination") (citations and internal quotation marks omitted).

1991 Act effects a major expansion in the relief available to victims of employment discrimination.

In 1990, a comprehensive civil rights bill passed both Houses of Congress. Although similar to the 1991 Act in many other respects, the 1990 bill differed in that it contained language expressly calling for application of many of its provisions, including the section providing for damages in cases of intentional employment discrimination, to cases arising before its (expected) enactment.[8] The President ve-

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[8] The relevant section of the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), provided:

"SEC. 15. APPLICATION OF AMENDMENTS AND TRANSITION RULES.

"(a) APPLICATION OF AMENDMENTS.—The amendments made by—

"(1) section 4 shall apply to all proceedings pending on or commenced after June 5, 1989 [the date of *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642];

"(2) section 5 shall apply to all proceedings pending on or commenced after May 1, 1989 [the date of *Price Waterhouse* v. *Hopkins*, 490 U. S. 228];

"(3) section 6 shall apply to all proceedings pending on or commenced after June 12, 1989 [the date of *Martin* v. *Wilks*, 490 U. S. 755];

"(4) sections 7(a)(1), 7(a)(3) and 7(a)(4), 7(b), 8 [providing for compensatory and punitive damages for intentional discrimination], 9, 10, and 11 shall apply to all proceedings pending on or commenced after the date of enactment of this Act;

"(5) section 7(a)(2) shall apply to all proceedings pending on or after June 12, 1989 [the date of *Lorance* v. *AT&T Technologies, Inc.*, 490 U. S. 900]; and

"(6) section 12 shall apply to all proceedings pending on or commenced after June 15, 1989 [the date of *Patterson* v. *McLean Credit Union*, 491 U. S. 164].

"(b) TRANSITION RULES.—

"(1) IN GENERAL.—Any orders entered by a court between the effective dates described in subsection (a) and the date of enactment of this Act that are inconsistent with the amendments made by sections 4, 5, 7(a)(2), or 12, shall be vacated if, not later than 1 year after such date of enactment, a request for such relief is made.

. . . . .

"(3) FINAL JUDGMENTS.—Pursuant to paragraphs (1) and (2), any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and toed the 1990 legislation, however, citing the bill's "unfair retroactivity rules" as one reason for his disapproval.[9] Congress narrowly failed to override the veto. See 136 Cong. Rec. S16589 (Oct. 24, 1990) (66 to 34 Senate vote in favor of override).

The absence of comparable language in the 1991 Act cannot realistically be attributed to oversight or to unawareness of the retroactivity issue. Rather, it seems likely that one of the compromises that made it possible to enact the 1991 version was an agreement *not* to include the kind of explicit retroactivity command found in the 1990 bill.

The omission of the elaborate retroactivity provision of the 1990 bill—which was by no means the only source of political controversy over that legislation—is not dispositive because it does not tell us precisely where the compromise was struck in the 1991 Act. The Legislature might, for example, have settled in 1991 on a less expansive form of retroactivity that, unlike the 1990 bill, did not reach cases already finally decided. See n. 8, *supra.* A decision to reach only cases still pending might explain Congress' failure to provide in the

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vested, where the time for seeking further judicial review of such judgment has otherwise expired pursuant to title 28 of the United States Code, the Federal Rules of Civil Procedure, and the Federal Rules of Appellate Procedure, shall be vacated in whole or in part if justice requires pursuant to rule 60(b)(6) of the Federal Rules of Civil Procedure or other appropriate authority, and consistent with the constitutional requirements of due process of law."

[9] See President's Message to the Senate Returning Without Approval the Civil Rights Act of 1990, 26 Weekly Comp. Pres. Doc. 1632–1634 (Oct. 22, 1990), reprinted in 136 Cong. Rec. S16418, S16419 (Oct. 22, 1990). The President's veto message referred to the bill's "retroactivity" only briefly; the Attorney General's Memorandum to which the President referred was no more expansive, and may be read to refer only to the bill's special provision for reopening final judgments, see n. 8, *supra,* rather than its provisions covering pending cases. See Memorandum of the Attorney General to the President (Oct. 22, 1990) in App. to Brief for Petitioner A–13 ("And Section 15 unfairly applies the changes in the law made by S. 2104 to *cases already decided*") (emphasis added).

1991 Act, as it had in 1990, that certain sections would apply to proceedings pending on specific preenactment dates. Our first question, then, is whether the statutory text on which petitioner relies manifests an intent that the 1991 Act should be applied to cases that arose and went to trial before its enactment.

III

Petitioner's textual argument relies on three provisions of the 1991 Act: §§ 402(a), 402(b), and 109(c). Section 402(a), the only provision of the Act that speaks directly to the question before us, states:

> "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment."

That language does not, by itself, resolve the question before us. A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.[10]

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[10] The history of prior amendments to Title VII suggests that the "effective-upon-enactment" formula would have been an especially inapt way to reach pending cases. When it amended Title VII in the Equal Employment Opportunity Act of 1972, Congress explicitly provided:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." Pub. L. 92–261, § 14, 86 Stat. 113. In contrast, in amending Title VII to bar discrimination on the basis of pregnancy in 1978, Congress provided:

> "Except as provided in subsection (b), the amendment made by this Act shall be effective on the date of enactment." § 2(a), 92 Stat. 2076.

The only Courts of Appeals to consider whether the 1978 amendments applied to pending cases concluded that they did not. See *Schwabenbauer* v. *Board of Ed. of School Dist. of Olean*, 667 F. 2d 305, 310, n. 7 (CA2 1981); *Condit* v. *United Air Lines, Inc.*, 631 F. 2d 1136, 1139–1140 (CA4 1980). See also *Jensen* v. *Gulf Oil Refining & Marketing Co.*, 623 F. 2d 406, 410 (CA5 1980) (Age Discrimination in Employment Act amendments designated to "take effect on the date of enactment of this Act" inapplica-

Petitioner does not argue otherwise. Rather, she contends that the introductory clause of § 402(a) would be superfluous unless it refers to §§ 402(b) and 109(c), which provide for prospective application in limited contexts.

The parties agree that § 402(b) was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company. Section 402(b) provides:

> "(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."

Section 109(c), part of the section extending Title VII to overseas employers, states:

> "(c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act."

According to petitioner, these two subsections are the "other provisions" contemplated in the first clause of § 402(a), and together create a strong negative inference that all sections of the Act not specifically declared prospective apply to pending cases that arose before November 21, 1991.

Before addressing the particulars of petitioner's argument, we observe that she places extraordinary weight on two comparatively minor and narrow provisions in a long and complex statute. Applying the entire Act to cases arising from preenactment conduct would have important consequences, including the possibility that trials completed before its en-

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ble to case arising before enactment); *Sikora* v. *American Can Co.*, 622 F. 2d 1116, 1119–1124 (CA3 1980) (same). If we assume that Congress was familiar with those decisions, cf. *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979), its choice of language in § 402(a) would imply nonretroactivity.

actment would need to be retried and the possibility that employers would be liable for punitive damages for conduct antedating the Act's enactment. Purely prospective application, on the other hand, would prolong the life of a remedial scheme, and of judicial constructions of civil rights statutes, that Congress obviously found wanting. Given the high stakes of the retroactivity question, the broad coverage of the statute, and the prominent and specific retroactivity provisions in the 1990 bill, it would be surprising for Congress to have chosen to resolve that question through negative inferences drawn from two provisions of quite limited effect.

Petitioner, however, invokes the canon that a court should give effect to every provision of a statute and thus avoid redundancy among different provisions. See, *e. g., Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837, and n. 11 (1988). Unless the word "otherwise" in § 402(a) refers to either § 402(b) or § 109(c), she contends, the first five words in § 402(a) are entirely superfluous. Moreover, relying on the canon *"[e]xpressio unius est exclusio alterius,"* see *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168 (1993), petitioner argues that because Congress provided specifically for prospectivity in two places (§§ 109(c) and 402(b)), we should infer that it intended the opposite for the remainder of the statute.

Petitioner emphasizes that § 402(a) begins: "Except as otherwise specifically provided." A scan of the statute for other "specific provisions" concerning effective dates reveals that §§ 402(b) and 109(c) are the most likely candidates. Since those provisions decree prospectivity, and since § 402(a) tells us that the specific provisions are *exceptions*, § 402(b) should be considered as prescribing a general rule of retroactivity. Petitioner's argument has some force, but we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it. Had Congress wished § 402(a) to have such a determinate meaning, it surely would have used language comparable to its reference to the predecessor Title VII damages provisions in the 1990 legislation: that the new provisions "shall apply to all proceedings pending on or commenced after the date of enactment of this Act." S. 2104, 101st Cong., 1st Sess. § 15(a)(4) (1990).

It is entirely possible that Congress inserted the "otherwise specifically provided" language not because it understood the "takes effect" clause to establish a rule of retroactivity to which only two "other specific provisions" would be exceptions, but instead to assure that any specific timing provisions in the Act would prevail over the general "take effect on enactment" command. The drafters of a complicated piece of legislation containing more than 50 separate sections may well have inserted the "except as otherwise provided" language merely to avoid the risk of an inadvertent conflict in the statute.[11] If the introductory clause of § 402(a) was intended to refer specifically to §§ 402(b), 109(c), or both, it is difficult to understand why the drafters chose the word "otherwise" rather than either or both of the appropriate section numbers.

We are also unpersuaded by petitioner's argument that both §§ 402(b) and 109(c) merely duplicate the "take effect upon enactment" command of § 402(a) unless all other provisions, including the damages provisions of § 102, apply to pending cases. That argument depends on the assumption that all those other provisions must be treated uniformly for purposes of their application to pending cases based on preenactment conduct. That thesis, however, is by no means an inevitable one. It is entirely possible—indeed, highly probable—that, because it was unable to resolve the retroactivity issue with the clarity of the 1990 legislation, Congress viewed the matter as an open issue to be resolved by the courts. Our precedents on retroactivity left doubts about what default rule would apply in the absence of congressional guidance, and suggested that some provisions might apply to cases arising before enactment while others might not.[12] Compare *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204 (1988), with *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696 (1974). See also *Bennett* v. *New Jersey,* 470 U. S. 632 (1985). The only matters Congress did *not* leave to the courts were set out with specificity in §§ 109(c) and 402(b). Congressional doubt concerning judicial retroactivity doctrine, coupled with the likelihood that the routine "take effect upon enactment" language would require courts to fall back upon that doctrine, provide a plausible explanation for both §§ 402(b) and 109(c) that makes neither provision redundant.

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[11] There is some evidence that the drafters of the 1991 Act did not devote particular attention to the interplay of the Act's "effective date" provisions. Section 110, which directs the EEOC to establish a "Technical Assistance Training Institute" to assist employers in complying with antidiscrimination laws and regulations, contains a subsection providing that it "shall take effect on the date of the enactment of this Act." § 110(b). That provision and § 402(a) are unavoidably redundant.

Turning to the text of § 402(b), it seems unlikely that the introductory phrase ("Notwithstanding any other provision of this Act") was meant to refer to the immediately preceding subsection. Since petitioner does not contend that any *other* provision speaks to the general effective date issue, the logic of her argument requires us to interpret that phrase to mean nothing more than "Notwithstanding § 402(a)." Petitioner's textual argument assumes that the drafters selected the indefinite word "otherwise" in § 402(a) to identify two specific subsections and the even more indefinite term "any other provision" in § 402(b) to refer to nothing more than § 402(b)'s next-door neighbor—§ 402(a). Here again, petitioner's statutory argument would require us to assume that Congress chose a surprisingly indirect route to convey an important and easily expressed message concerning the Act's effect on pending cases.

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[12] This point also diminishes the force of petitioner's "*expressio unius*" argument. Once one abandons the unsupported assumption that Congress expected that all of the Act's provisions would be treated alike, and takes account of uncertainty about the applicable default rule, §§ 109(c) and 402(b) do not carry the negative implication petitioner draws from them. We do not read either provision as doing anything more than definitively rejecting retroactivity with respect to the specific matters covered by its plain language.

The relevant legislative history of the 1991 Act reinforces our conclusion that §§ 402(a), 109(c), and 402(b) cannot bear the weight petitioner places upon them. The 1991 bill as originally introduced in the House contained explicit retroactivity provisions similar to those found in the 1990 bill.[13] However, the Senate substitute that was agreed upon omitted those explicit retroactivity provisions.[14] The legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.[15] The history reveals no evidence that Members believed that an agreement had been tacitly struck on the controversial retroactivity issue, and little to suggest that *Congress* understood or intended the interplay of §§ 402(a), 402(b), and 109(c) to have the decisive effect petitioner assigns them. Instead, the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct.

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[13] See, *e. g.*, H. R. 1, 102d Cong., 1st Sess. § 113 (1991), reprinted in 137 Cong. Rec. H3924–H3925 (Jan. 3, 1991). The prospectivity proviso to the section extending Title VII to overseas employers was first added to legislation that generally was to apply to pending cases. See H. R. 1, 102d Cong., 1st Sess. § 119(c) (1991), reprinted in 137 Cong. Rec. H3925–H3926 (June 5, 1991). Thus, at the time its language was introduced, the provision that became § 109(c) was surely not redundant.

[14] On the other hand, two proposals that would have provided explicitly for prospectivity also foundered. See 137 Cong. Rec. S3021, S3023 (Mar. 12, 1991); *id.*, at 13255, 13265–13266.

[15] For example, in an "interpretive memorandum" introduced on behalf of seven Republican sponsors of S. 1745, the bill that became the 1991 Act, Senator Danforth stated that "[t]he bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment *and shall not apply retroactively.*" *Id.*, at 29047 (emphasis added). Senator Kennedy responded that it "will be up to the courts to determine the extent to which the bill will apply to cases and claims that were pending on the date of enactment." *Ibid.* (citing *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696 (1974)). The legislative history reveals other partisan statements on the proper meaning of the Act's "effective date" provisions. Senator Danforth observed that such statements carry little weight as legislative history. As he put it:

Although the passage of the 1990 bill may indicate that a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path charted in Article I, § 7, cl. 2, of the Constitution. See *INS* v. *Chadha*, 462 U. S. 919, 946–951 (1983). In the absence of the kind of unambiguous directive found in § 15 of the 1990 bill, we must look elsewhere for guidance on whether § 102 applies to this case.

IV

It is not uncommon to find "apparent tension" between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.[16] In order to resolve the question left open by the 1991 Act, federal courts have labored to

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"[A] court would be well advised to take with a large grain of salt floor debate and statements placed in the CONGRESSIONAL RECORD which purport to create an interpretation for the legislation that is before us." 137 Cong. Rec. S15325 (Oct. 29, 1991).

[16] See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395 (1950). Llewellyn's article identified the apparent conflict between the canon that

> "[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect"

and the countervailing rule that

> "[r]emedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." *Id.*, at 402 (citations omitted).

reconcile two seemingly contradictory statements found in our decisions concerning the effect of intervening changes in the law. Each statement is framed as a generally applicable rule for interpreting statutes that do not specify their temporal reach. The first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley,* 416 U. S., at 711. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen,* 488 U. S., at 208.

We have previously noted the "apparent tension" between those expressions. See *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,* 494 U. S. 827, 837 (1990); see also *Bennett,* 470 U. S., at 639–640. We found it unnecessary in *Kaiser* to resolve that seeming conflict "because under either view, where the congressional intent is clear, it governs," and the prejudgment interest statute at issue in that case evinced "clear congressional intent" that it was "not applicable to judgments entered before its effective date." 499 U. S., at 837–838. In the case before us today, however, we have concluded that the 1991 Act does not evince any clear expression of intent on § 102's application to cases arising before the Act's enactment. We must, therefore, focus on the apparent tension between the rules we have espoused for handling similar problems in the absence of an instruction from Congress.

We begin by noting that there is no tension between the *holdings* in *Bradley* and *Bowen,* both of which were unanimous decisions. Relying on another unanimous decision—*Thorpe* v. *Housing Authority of Durham,* 393 U. S. 268 (1969)—we held in *Bradley* that a statute authorizing the award of attorney's fees to successful civil rights plaintiffs applied in a case that was pending on appeal at the time the statute was enacted. *Bowen* held that the Department of Health and Human Services lacked statutory authority to promulgate a rule requiring private hospitals to refund Medicare payments for services rendered before promulgation of the rule. Our opinion in *Bowen* did not purport to overrule *Bradley* or to limit its reach. In this light, we turn to the "apparent tension" between the two canons mindful of another canon of unquestionable vitality, the "maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821).

A

As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.[17] Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[18] For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser*, 494 U. S., at 855 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

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[17] See *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 842–844, 855–856 (1990) (SCALIA, J., concurring). See also, *e. g.*, *Dash* v. *Van Kleeck*, 7 Johns. *477, *503 (N. Y. 1811) ("It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C. J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775 (1936).

[18] See *General Motors Corp.* v. *Romein*, 503 U. S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Munzer, A Theory of Retroactive Legislation, 61 Texas L. Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance"). See also L. Fuller, The Morality of Law 51–62 (1964) (hereinafter Fuller).

It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.[19] Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9–10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, *e. g., United States* v. *Brown,* 381 U. S. 437, 456–462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. *Usery* v. *Turner Elkhorn Mining Co.,* 428 U. S. 1, 17 (1976).

These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in *Weaver* v. *Graham,* 450 U. S. 24 (1981), the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.*, at 28–29 (citations omitted).[20]

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[19] Article I contains two *Ex Post Facto* Clauses, one directed to Congress (§ 9, cl. 3), the other to the States (§ 10, cl. 1). We have construed the Clauses as applicable only to penal legislation. See *Calder* v. *Bull,* 3 Dall. 386, 390–391 (1798) (opinion of Chase, J.).

The Constitution's restrictions, of course, are of limited scope. Absent a violation of one of those specific provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope.[21] Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

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[20] See *Richmond* v. *J. A. Croson Co.*, 488 U. S. 469, 513–514 (1989) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed") (STEVENS, J., concurring in part and concurring in judgment); *James* v. *United States*, 366 U. S. 213, 247, n. 3 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

James Madison argued that retroactive legislation also offered special opportunities for the powerful to obtain special and improper legislative benefits. According to Madison, "[b]ills of attainder, ex post facto laws, and laws impairing the obligation of contracts" were "contrary to the first principles of the social compact, and to every principle of sound legislation," in part because such measures invited the "influential" to "speculat[e] on public measures," to the detriment of the "more industrious and less informed part of the community." The Federalist No. 44, p. 301 (J. Cooke ed. 1961). See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 693 (1960) (a retroactive statute "may be passed with an exact knowledge of who will benefit from it").

[21] In some cases, however, the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application. For if a challenged statute is to be given retroactive effect, the regulatory interest that supports prospective application will not necessarily also sustain its application to past events. See *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U. S. 717, 730 (1984); *Usery* v. *Turner*

While statutory retroactivity has long been disfavored, deciding when a statute operates "retroactively" is not always a simple or mechanical task. Sitting on Circuit, Justice Story offered an influential definition in *Society for Propagation of the Gospel* v. *Wheeler,* 22 F. Cas. 756 (No. 13,156) (CC NH 1814), a case construing a provision of the New Hampshire Constitution that broadly prohibits "retrospective" laws both criminal and civil.[22] Justice Story first rejected the notion that the provision bars only explicitly retroactive legislation, *i. e.,* "statutes . . . enacted to take effect from a time anterior to their passage." *Id.,* at 767. Such a construction, he concluded, would be "utterly subversive of all the objects" of the prohibition. *Ibid.* Instead, the ban on retrospective legislation embraced "all statutes, which, though operating only from their passage, affect vested

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Elkhorn Mining Co., 428 U. S. 1, 17 (1976). In this case the punitive damages provision may raise a question, but for present purposes we assume that Congress has ample power to provide for retroactive application of § 102.

[22] Article 23 of the New Hampshire Bill of Rights provides: "Retrospective laws are highly injurious, oppressive and unjust. No such laws, therefore, should be made, either for the decision of civil causes or the punishment of offenses." At issue in the *Society* case was a new statute that reversed a common-law rule by allowing certain wrongful possessors of land, upon being ejected by the rightful owner, to obtain compensation for improvements made on the land. Justice Story held that the new statute impaired the owner's rights and thus could not, consistently with Article 23, be applied to require compensation for improvements made before the statute's enactment. See 22 F. Cas., at 766–769.

rights and past transactions." *Ibid.* "Upon principle," Justice Story elaborated,

> "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . ." *Ibid.* (citing *Calder* v. *Bull*, 3 Dall. 386 (1798), and *Dash* v. *Van Kleeck*, 7 Johns. *477 (N. Y. 1811)).

Though the formulas have varied, similar functional conceptions of legislative "retroactivity" have found voice in this Court's decisions and elsewhere.[23]

A statute does not operate "retrospectively" merely because it is applied in a case arising from conduct antedating the statute's enactment, see *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. 80, 100 (1992) (THOMAS, J., concurring in part and concurring in judgment), or upsets expectations based in prior law.[24] Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have "sound . . . instinct[s]," see *Danforth* v. *Groton Water Co.*, 178 Mass. 472, 476, 59 N. E. 1033, 1034 (1901) (Holmes, J.), and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

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[23] See, *e. g., Miller* v. *Florida*, 482 U. S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") (quoting *Weaver* v. *Graham*, 450 U. S. 24, 31 (1981)); *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913) (retroactive statute gives "a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed"); *Sturges* v. *Carter*, 114 U. S. 511, 519 (1885) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability"). See also Black's Law Dictionary 1184 (5th ed. 1979) (quoting Justice Story's definition from *Society*); 2 N. Singer, Sutherland on Statutory Construction §41.01, p. 337 (5th rev. ed. 1993) ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage . . . . They describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act").

[24] Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property; a new law banning gambling harms the person who had begun to construct a casino before the law's enactment or

Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent. Thus, in *United States* v. *Heth*, 3 Cranch 399 (1806), we refused to apply a federal statute reducing the commissions of customs collectors to collections commenced before the statute's enactment because the statute lacked "clear, strong, and imperative" language requiring retroactive application, *id.*, at 413 (opinion of Paterson, J.). The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. Indeed, at common law a contrary rule applied to statutes that merely *removed* a burden on private rights by repealing a penal provision (whether criminal or civil); such

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spent his life learning to count cards. See Fuller 60 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever"). Moreover, a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." *Cox* v. *Hart*, 260 U. S. 427, 435 (1922). See *Reynolds* v. *United States*, 292 U. S. 443, 444–449 (1934); *Chicago & Alton R. Co.* v. *Tranbarger*, 238 U. S. 67, 73 (1915).

repeals were understood to preclude punishment for acts antedating the repeal. See, *e. g., United States* v. *Chambers,* 291 U. S. 217, 223–224 (1934); *Gulf, C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503, 506 (1912); *United States* v. *Tynen,* 11 Wall. 88, 93–95 (1871); *Norris* v. *Crocker,* 13 How. 429, 440–441 (1852); *Maryland ex rel. Washington Cty.* v. *Baltimore & Ohio R. Co.,* 3 How. 534, 552 (1845); *Yeaton* v. *United States,* 5 Cranch 281, 284 (1809). But see 1 U. S. C. § 109 (repealing common-law rule).

The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.[25] The presumption has not, however, been limited to such cases. At issue in *Chew Heong* v. *United States,* 112 U. S. 536 (1884), for example, was a provision of the "Chinese Restriction Act" of 1882 barring Chinese laborers from reentering the United States without a certificate prepared when they exited this country. We held that the statute did not bar the reentry of a laborer who had left the United States before the certification requirement was promulgated. Justice Harlan's opinion for the Court observed that the law in effect before the 1882 enactment had accorded laborers a right to reenter without a certificate, and invoked the "uniformly" accepted rule against "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature." *Id.*, at 559.

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[25] See, *e. g., United States* v. *Security Industrial Bank,* 459 U. S. 70, 79–82 (1982); *Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141, 164 (1944); *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 3 (1926); *Holt* v. *Henley,* 232 U. S. 637, 639 (1914); *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S., at 199; *Twenty per Cent. Cases,* 20 Wall. 179, 187 (1874); *Sohn* v. *Waterson,* 17 Wall. 596, 599 (1873); *Carroll* v. *Lessee of Carroll,* 16 How. 275 (1854). While the great majority of our decisions relying upon the antiretroactivity presumption have involved intervening statutes burdening private parties, we have applied the presumption in cases involving new monetary obligations that fell only on the government. See *United States* v. *Magnolia Petroleum Co.,* 276 U. S. 160 (1928); *White* v. *United States,* 191 U. S. 545 (1903).

Our statement in *Bowen* that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result," 488 U. S., at 208, was in step with this long line of cases.[26] *Bowen* itself was a paradigmatic case of retroactivity in which a federal agency sought to recoup, under cost limit regulations issued in 1984, funds that had been paid to hospitals for services rendered earlier, see *id.*, at 207; our search for clear congressional intent authorizing retroactivity was consistent with the approach taken in decisions spanning two centuries.

The presumption against statutory retroactivity had special force in the era in which courts tended to view legislative interference with property and contract rights circumspectly. In this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S., at 15–16; *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 436–444 (1934). But while the *constitutional* impediments to retroactive civil legislation are now modest, prospectivity remains the appropriate default rule. Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate.

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[26] See also, *e. g.*, *Greene* v. *United States*, 376 U. S. 149, 160 (1964); *White* v. *United States*, 191 U. S. 545 (1903); *United States* v. *Moore*, 95 U. S. 760, 762 (1878); *Murray* v. *Gibson*, 15 How. 421, 423 (1854); *Ladiga* v. *Roland*, 2 How. 581, 589 (1844).

B

Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should "apply the law in effect at the time it renders its decision," *Bradley*, 416 U. S., at 711, even though that law was enacted after the events that gave rise to the suit. There is, of course, no conflict between that principle and a *presumption* against retroactivity when the statute in question is unambiguous. Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801), illustrates this point. Because a treaty signed on September 30, 1800, while the case was pending on appeal, unambiguously provided for the restoration of captured property "not yet *definitively* condemned," *id.*, at 107 (emphasis in original), we reversed a decree entered on September 23, 1800, condemning a French vessel that had been seized in American waters. Our application of "the law in effect" at the time of our decision in *Schooner Peggy* was simply a response to the language of the statute. *Id.*, at 109.

Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro,*" and that the plaintiff had no "vested right" in the decree entered by the trial court. 257 U. S., at 201. See also, *e. g., Hall* v. *Beals,* 396 U. S. 45, 48 (1969); *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 464 (1921).

We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Thus, in *Bruner* v. *United States,* 343 U. S. 112, 116–117 (1952), relying on our "consisten[t]" practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed.[27] See also *Hallowell* v. *Commons,* 239 U. S. 506, 508–509 (1916); *Assessors* v. *Osbornes,* 9 Wall. 567, 575 (1870). Conversely, in *Andrus* v. *Charlestone Stone Products Co.,* 436 U. S. 604, 607–608, n. 6 (1978), we held that, because a statute passed while the case was pending on appeal had eliminated the amount-in-controversy requirement for federal-question cases, the fact that respondent had failed to allege $10,000 in controversy at the commencement of the action was "now of no moment." See also *United States* v. *Alabama,* 362 U. S. 602, 604 (1960) *(per curiam); Stephens* v. *Cherokee Nation,* 174 U. S. 445, 478 (1899). Application of a new jurisdictional rule usually "takes away no substantive right but simply changes the tribunal that is to hear the case." *Hallowell,* 239 U. S., at 508. Present law normally governs in such situations because jurisdictional statutes "speak to the power of the court rather than to the rights or obligations of the parties," *Republic Nat. Bank of Miami,* 506 U. S., at 100 (THOMAS, J., concurring).

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[27] In *Bruner,* we specifically noted:

"This jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication. Compare *United States* v. *St. Louis, S. F. & T. R. Co.,* 270 U. S. 1, 3 (1926), with *Smallwood* v. *Gallardo,* 275 U. S. 56, 61 (1927)." 343 U. S., at 117, n. 8.

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. For example, in *Ex parte Collett,* 337 U. S. 55, 71 (1949), we held that 28 U. S. C. § 1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. 337 U. S., at 71.[28] Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. Cf. *McBurney* v. *Carson,* 99 U. S. 567, 569 (1879).[29]

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[28] While we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case. See, *e. g., Dobbert* v. *Florida,* 432 U. S. 282, 293–294 (1977); see also *Collins* v. *Youngblood,* 497 U. S. 37 (1990); *Beazell* v. *Ohio,* 269 U. S. 167 (1925).

[29] Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case. See, *e. g.,* Order Amending Federal Rules of Criminal Procedure, 495 U. S. 969 (1990) (amendments applicable to pending cases "insofar as just and practicable"); Order Amending Federal Rules of Civil Procedure, 456 U. S. 1015 (1982) (same); Order Amending Bankruptcy Rules and Forms, 421 U. S. 1021 (1975) (amendments applicable to pending cases "except to the extent that in the opinion of the court their application in a particular proceeding then pending would not be feasible or would work injustice"). Contrary to JUSTICE SCALIA's suggestion, *post,* at 290, we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." (Neither is Justice Story's definition of retroactivity, quoted *supra,* at 269, so restricted.) Nor do we suggest that concerns about retroactivity have no application to procedural rules.

Petitioner relies principally upon *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696 (1974), and *Thorpe* v. *Housing Authority of Durham,* 393 U. S. 268 (1969), in support of her argument that our ordinary interpretive rules support application of § 102 to her case. In *Thorpe,* we held that an agency circular requiring a local housing authority to give notice of reasons and opportunity to respond before evicting a tenant was applicable to an eviction proceeding commenced before the regulation issued. *Thorpe* shares much with both the "procedural" and "prospective-relief" cases. See *supra,* at 273–275. Thus, we noted in *Thorpe* that new hearing procedures did not affect either party's obligations under the lease agreement between the housing authority and the petitioner, 393 U. S., at 279, and, because the tenant had "not yet vacated," we saw no significance in the fact that the housing authority had "decided to evict her before the circular was issued," *id.,* at 283. The Court in *Thorpe* viewed the new eviction procedures as "essential to remove a serious impediment to the successful protection of constitutional rights." *Ibid.*[30] Cf. *Youakim* v. *Miller,* 425 U. S. 231, 237 (1976) *(per curiam)* (citing *Thorpe* for propriety of applying new law to avoiding necessity of deciding constitutionality of old one).

Our holding in *Bradley* is similarly compatible with the line of decisions disfavoring "retroactive" application of statutes. In *Bradley,* the District Court had awarded attorney's fees and costs, upon general equitable principles, to parents who had prevailed in an action seeking to desegregate the public schools of Richmond, Virginia. While the case was pending before the Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, which authorized federal courts to award the prevailing parties in school desegregation cases a reasonable attorney's fee. The Court of Appeals held that the new fee provision did not authorize the award of fees for services rendered before the effective date of the amendments. This Court reversed. We concluded that the private parties could rely on § 718 to support their claim for attorney's fees, resting our decision "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U. S., at 711.

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[30] *Thorpe* is consistent with the principle, analogous to that at work in the common-law presumption about repeals of criminal statutes, that the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one. Cf. *DeGurules* v. *INS,* 833 F. 2d 861, 862–863 (CA9 1987). Indeed, *Thorpe* twice cited *United States* v. *Chambers,* 291 U. S. 217 (1934), which ordered dismissal of prosecutions pending when the National Prohibition Act was repealed. See *Thorpe,* 393 U. S., at 281, n. 38; *id.,* at 282, n. 40.

Although that language suggests a categorical presumption in favor of application of *all* new rules of law, we now make it clear that *Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely "retroactive" effect. Like the new hearing requirement in *Thorpe*, the attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White* v. *New Hampshire Dept. of Employment Security*, 455 U. S. 445, 451–452 (1982). See also *Hutto* v. *Finney*, 437 U. S. 678, 695, n. 24 (1978). Moreover, even before the enactment of § 718, federal courts had authority (which the District Court in *Bradley* had exercised) to award fees based upon equitable principles. As our opinion in *Bradley* made clear, it would be difficult to imagine a stronger equitable case for an attorney's fee award than a lawsuit in which the plaintiff parents would otherwise have to bear the costs of desegregating their children's public schools. See 416 U. S., at 718 (noting that the plaintiffs had brought the school board "into compliance with its constitutional mandate") (citing *Brown* v. *Board* *of Education,* 347 U. S. 483, 494 (1954)). In light of the prior availability of a fee award, and the likelihood that fees would be assessed under pre-existing theories, we concluded that the new fee statute simply "d[id] not impose an additional or unforeseeable obligation" upon the school board. *Bradley,* 416 U. S., at 721.

In approving application of the new fee provision, *Bradley* did not take issue with the long line of decisions applying the presumption against retroactivity. Our opinion distinguished, but did not criticize, prior cases that had applied the antiretroactivity canon. See *id.,* at 720 (citing *Greene* v. *United States,* 376 U. S. 149, 160 (1964); *Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141, 164 (1944), and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190, 199 (1913)). The authorities we relied upon in *Bradley* lend further support to the conclusion that we did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment. See *Kaiser,* 494 U. S., at 849–850 (SCALIA, J., concurring). *Bradley* relied on *Thorpe* and on other precedents that are consistent with a presumption against statutory retroactivity, including decisions involving explicitly retroactive statutes, see 416 U. S., at 713, n. 17 (citing, *inter alia, Freeborn* v. *Smith,* 2 Wall. 160 (1865)),[31] the retroactive application of intervening *judicial* decisions, see 416 U. S., at 713–714, n. 17 (citing, *inter alia, Patterson* v. *Alabama,* 294 U. S. 600, 607 (1935)),[32] statutes altering jurisdiction, 416 U. S., at 713, n. 17 (citing, *inter alia, United States* v. *Alabama,* 362 U. S. 602 (1960)), and repeal of a criminal statute, 416 U. S., at 713, n. 17 (citing *United States* v. *Chambers,* 291 U. S. 217 (1934)). Moreover, in none of our decisions that have relied upon *Bradley* or *Thorpe* have we cast doubt on the traditional presumption against truly "retrospective" application of a statute.[33]

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[31] In *Bradley,* we cited *Schooner Peggy* for the "current law" principle, but we recognized that the law at issue in *Schooner Peggy* had expressly called for retroactive application. See 416 U. S., at 712, n. 16 (describing *Schooner Peggy* as holding that Court was obligated to "apply the terms of the convention," which had recited that it applied to all vessels not yet "*definitively* condemned") (emphasis in convention).

[32] At the time *Bradley* was decided, it was by no means a truism to point out that rules announced in intervening judicial decisions should normally be applied to a case pending when the intervening decision came down. In 1974, our doctrine on judicial retroactivity involved a substantial measure of discretion, guided by equitable standards resembling the *Bradley*

"manifest injustice" test itself. See *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106–107 (1971); *Linkletter* v. *Walker,* 381 U. S. 618, 636 (1965). While it was accurate in 1974 to say that a new rule announced in a judicial decision was only *presumptively* applicable to pending cases, we have since established a firm rule of retroactivity. See *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86 (1993); *Griffith* v. *Kentucky,* 479 U. S. 314 (1987).

[33] See, *e. g., Treasury Employees* v. *Von Raab,* 489 U. S. 656, 661–662, and n. 1 (1989) (considering intervening regulations in injunctive action challenging agency's drug testing policy under Fourth Amendment) (citing *Thorpe*); *Goodman* v. *Lukens Steel Co.,* 482 U. S. 656, 662 (1987) (applying rule announced in judicial decision to case arising before the decision and citing *Bradley* for the "usual rule . . . that federal cases should be decided in accordance with the law existing at the time of the decision"); *Saint Francis College* v. *Al-Khazraji,* 481 U. S. 604, 608 (1987) (in case involving retroactivity of judicial decision, citing *Thorpe* for same "usual rule"); *Hutto* v. *Finney,* 437 U. S., at 694, n. 23 (relying on "general practice" and *Bradley* to uphold award of attorney's fees under statute passed after the services had been rendered but while case was still pending); *Youakim,* 425 U. S., at 237 *(per curiam)* (remanding for reconsideration of constitutional claim for injunctive relief in light of intervening state regulations) (citing *Thorpe*); *Cort* v. *Ash,* 422 U. S. 66, 77 (1975) (stating that *Bradley* warranted application of intervening statute transferring to administrative agency jurisdiction over claim for injunctive relief); *Hamling* v. *United States,* 418 U. S. 87, 101–102 (1974) (reviewing obscenity conviction in light of subsequent First Amendment decision of this Court) (citing *Bradley*); *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 49, n. 21 (1974) (in action for injunction against enforcement of banking disclosure statute, citing *Thorpe* for proposition that Court should consider constitutional question in light of regulations issued after commencement of suit); *Diffenderfer* v. *Central Baptist Church of Miami, Inc.,* 404 U. S. 412, 414 (1972) (citing *Thorpe* in holding that intervening repeal of a state tax exemption for certain church property rendered "inappropriate" petitioner's request for injunctive relief based on the Establishment Clause); *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 419 (1971) (refusing

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i. e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

V

We now ask whether, given the absence of guiding instructions from Congress, § 102 of the Civil Rights Act of 1991 is the type of provision that should govern cases arising before its enactment. As we observed *supra*, at 260–261, and n. 12, there is no special reason to think that all the diverse provisions of the Act must be treated uniformly for such purposes. To the contrary, we understand the instruction that the provisions are to "take effect upon enactment" to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct.

Two provisions of § 102 may be readily classified according to these principles. The jury trial right set out in § 102(c)(1) is plainly a procedural change of the sort that would ordinarily govern in trials conducted after its effective date. If § 102 did no more than introduce a right to jury trial in Title

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to remand to agency under *Thorpe* for administrative findings required by new regulation because administrative record was already adequate for judicial review); *Hall* v. *Beals*, 396 U. S. 45, 48 (1969) (in action for injunctive relief from state election statute, citing *Thorpe* as authority for considering intervening amendment of statute).

VII cases, the provision would presumably apply to cases tried after November 21, 1991, regardless of when the underlying conduct occurred.[34] However, because § 102(c) makes a jury trial available only "[i]f a complaining party seeks compensatory or punitive damages," the jury trial option must stand or fall with the attached damages provisions.

Section 102(b)(1) is clearly on the other side of the line. That subsection authorizes punitive damages if the plaintiff shows that the defendant "engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." The very labels given "punitive" or "exemplary" damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question. See *Turner Elkhorn*, 428 U. S., at 17 (Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness"); *De Veau* v. *Braisted*, 363 U. S. 144, 160 (1960) ("The mark of an *ex post facto* law is the imposition of what can fairly be designated punishment for past acts"). See also *Louis Vuitton S. A.* v. *Spencer Handbags Corp.*, 765 F. 2d 966, 972 (CA2 1985) (retroactive application of punitive treble damages provisions of Trademark Counterfeiting Act of 1984 "would present a potential *ex post facto* problem"). Before we entertained that question, we would have to be confronted with a statute that explicitly authorized punitive damages for preenactment conduct. The Civil Rights Act of 1991 contains no such explicit command.

The provision of § 102(a)(1) authorizing the recovery of compensatory damages is not easily classified. It does not make unlawful conduct that was lawful when it occurred; as we have noted, *supra,* at 252–255, § 102 only reaches discriminatory conduct already prohibited by Title VII. Concerns about a lack of fair notice are further muted by the fact that such discrimination was in many cases (although not this one) already subject to monetary liability in the form of backpay. Nor could anyone seriously contend that the compensatory damages provisions smack of a "retributive" or other suspect legislative purpose. Section 102 reflects Congress' desire to afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964. At least with respect to its compensatory damages provisions, then, § 102 is not in a category in which objections to retroactive application on grounds of fairness have their greatest force.

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[34] As the Court of Appeals recognized, however, the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge. See n. 29, *supra*. Thus, customary practice would not support remand for a jury trial in this case.

Nonetheless, the new compensatory damages provision would operate "retrospectively" if it were applied to conduct occurring before November 21, 1991. Unlike certain other forms of relief, compensatory damages are quintessentially backward looking. Compensatory damages may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning.[35] In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

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[35] As petitioner and *amici* suggest, concerns of unfair surprise and upsetting expectations are attenuated in the case of intentional employment discrimination, which has been unlawful for more than a generation. However, fairness concerns would not be entirely absent if the damages provisions of § 102 were to apply to events preceding its enactment, as the facts of this case illustrate. Respondent USI's management, when apprised of the wrongful conduct of petitioner's co-worker, took timely action to remedy the problem. The law then in effect imposed no liability on an employer who corrected discriminatory work conditions before the conditions

In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers. Because Title VII previously authorized recovery of backpay in some cases, and because compensatory damages under § 102(a) are in addition to any backpay recoverable, the new provision also resembles a statute increasing the amount of damages available under a preestablished cause of action. Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. See *Society for Propagation of the Gospel*, 22 F. Cas., at 767. The *extent* of a party's liability, in the civil context as well as the criminal, is an important legal

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became so severe as to result in the victim's constructive discharge. Assessing damages against respondents on a theory of *respondeat superior* would thus entail an element of surprise. Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past. Cf. *Weaver*, 450 U. S., at 28–30 (*Ex Post Facto* Clause assures fair notice and governmental restraint, and does not turn on "an individual's right to less punishment"). The new damages provisions of § 102 can be expected to give managers an added incentive to take preventive measures to ward off discriminatory conduct by subordinates *before* it occurs, but that purpose is not served by applying the regime to preenactment conduct.

consequence that cannot be ignored.[36] Neither in *Bradley* itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. See *Winfree* v. *Northern Pacific R. Co.*, 227 U. S. 296, 301 (1913) (statute creating new federal cause of action for wrongful death inapplicable to case arising before enactment in absence of "explicit words" or "clear implication"); *United States Fidelity & Guaranty Co.* v. *United States ex rel. Struthers Wells*

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[36] The state courts have consistently held that statutes changing or abolishing limits on the amount of damages available in wrongful-death actions should not, in the absence of clear legislative intent, apply to actions arising before their enactment. See, *e. g., Dempsey* v. *State,* 451 A. 2d 273 (R. I. 1982) ("Every court which has considered the issue . . . has found that a subsequent change as to the amount or the elements of damage in the wrongful-death statute to be substantive rather than procedural or remedial, and thus any such change must be applied prospectively"); *Kleibrink* v. *Missouri-Kansas-Texas R. Co.,* 224 Kan. 437, 444, 581 P. 2d 372, 378 (1978) (holding, in accord with the "great weight of authority," that "an increase, decrease or repeal of the statutory maximum recoverable in wrongful death actions is *not* retroactive" and thus should not apply in a case arising before the statute's enactment) (emphasis in original); *Bradley* v. *Knutson,* 62 Wis. 2d 432, 436, 215 N. W. 2d 369, 371 (1974) (refusing to apply increase in cap on damages for wrongful death to misconduct occurring before effective date; "statutory increases in damage[s] limitations are actually changes in substantive rights and not mere remedial changes"); *State ex rel. St. Louis-San Francisco R. Co.* v. *Buder,* 515 S. W. 2d 409, 411 (Mo. 1974) (statute removing wrongful-death liability limitation construed not to apply to preenactment conduct; "an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto"); *Mihoy* v. *Proulx,* 113 N. H. 698, 701, 313 A. 2d 723, 725 (1973) ("To apply the increased limit after the date of the accident would clearly enlarge the defendant's liability retrospectively. In the absence of an express provision, we cannot conclude that the legislature intended retrospective application"). See also *Fann* v. *McGuffy,* 534 S. W. 2d 770, 774, n. 19 (Ky. 1975); *Muckler* v. *Buchl,* 150 N. W. 2d 689, 697 (Minn. 1967).

Co., 209 U. S. 306, 314–315 (1908) (construing statute *restricting* subcontractors' rights to recover damages from prime contractors as prospective in absence of "clear, strong and imperative" language from Congress favoring retroactivity).[37]

It will frequently be true, as petitioner and *amici* forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully.[38] That consideration, however, is not sufficient to rebut the presumption against retroactivity. Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute. Indeed, there is reason to believe that the omission of the 1990 version's express retroactivity provisions was a factor in the passage of the 1991 bill. Section 102 is plainly not the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective.

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[37] We have sometimes said that new "remedial" statutes, like new "procedural" ones, should presumptively apply to pending cases. See, *e. g., Ex parte Collett,* 337 U. S., at 71, and n. 38 ("Clearly, § 1404(a) is a remedial provision applicable to pending actions"); *Beazell,* 269 U. S., at 171 (*Ex Post Facto Clause* does not limit "legislative control of remedies and modes of procedure which do not affect matters of substance"). While that statement holds true for some kinds of remedies, see *supra,* at 273–274 (discussing prospective relief), we have not classified a statute introducing damages liability as the sort of "remedial" change that should presumptively apply in pending cases. "Retroactive modification" of damages remedies may "normally harbo[r] much less potential for mischief than retroactive changes in the principles of liability," *Hastings* v. *Earth Satellite Corp.,* 628 F. 2d 85, 93 (CADC), cert. denied, 449 U. S. 905 (1980), but that potential is nevertheless still significant.

[38] Petitioner argues that our decision in *Franklin* v. *Gwinnett County Public Schools,* 503 U. S. 60 (1992), supports application of § 102 to her case. Relying on the principle that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong,'" *id.,* at 66 (quoting *Bell* v. *Hood,* 327 U. S. 678, 684 (1946)), we held in *Franklin* that the right of action under Title IX of the Education Amendments of 1972 included a claim for damages. Petitioner argues that *Franklin* supports her position because, if she cannot obtain damages pursuant to § 102, she will be left remediless despite an adjudged violation of her right under Title VII to be free of workplace discrimination. However, Title VII of the Civil Rights Act of 1964 is not a statute to which we would apply the "traditional presumption in favor of all available remedies." 503 U. S., at 72. That statute did not create a "general right to sue" for employment discrimination, but instead specified a set of "circumscribed remedies." See *United States* v. *Burke,* 504 U. S. 229, 240 (1992). Until the 1991 amendment, the Title VII scheme did not allow for dam-

The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation. We are satisfied that it applies to § 102. Because we have found no clear evidence of congressional intent that § 102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment, we conclude that the judgment of the Court of Appeals must be affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgments.*

I

I of course agree with the Court that there exists a judicial presumption, of great antiquity, that a legislative enactment affecting substantive rights does not apply retroactively absent *clear statement* to the contrary. See generally *Kaiser*

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ages. We are not free to fashion remedies that Congress has specifically chosen not to extend. See *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, 97 (1981).

*[This opinion applies also to *Rivers* v. *Roadway Express, Inc.,* No. 92–938, *post,* p. 298.]

Aluminum & Chemical Corp. v. *Bonjorno*, 494 U. S. 827, 840 (1990) (SCALIA, J., concurring). The Court, however, is willing to let that clear statement be supplied, not by the text of the law in question, but by individual legislators who participated in the enactment of the law, and even legislators in an earlier Congress which tried and failed to enact a similar law. For the Court not only combs the floor debate and Committee Reports of the statute at issue, the Civil Rights Act of 1991 (1991 Act), Pub. L. 102–166, 105 Stat. 1071, see *ante*, at 262–263, but also reviews the procedural history of an earlier, unsuccessful, attempt by a *different* Congress to enact similar legislation, the Civil Rights Act of 1990, S. 2104, 101st Cong., 1st Sess. (1990), see *ante*, at 255–257, 263.

This effectively converts the "clear statement" rule into a "discernible legislative intent" rule—and even that understates the difference. The Court's rejection of the floor statements of certain Senators because they are "frankly partisan" and "cannot plausibly be read as reflecting any general agreement," *ante*, at 262, reads like any other exercise in the soft science of legislative historicizing,[1] undisciplined by any distinctive "clear statement" requirement. If it is a "clear statement" we are seeking, surely it is not enough to insist that the statement can "plausibly be read as reflecting general agreement"; the statement must *clearly* reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the "clear statement" retroactivity rule from the earliest times. See, *e. g., United States* v. *Heth*, 3 Cranch 399, 408 (1806) (Johnson, J.) ("Unless, therefore, the words are too imperious to admit of a different construction, [the Court should] restric[t] the words of the law to a future operation"); *id.*, at 414 (Cushing, J.) ("[I]t [is] unreasonable, in my opinion, to give the law a construction, which would have such a retrospective effect, unless it contained express words to that purpose"); *Murray* v. *Gibson,* 15 How. 421, 423 (1854) (statutes do not operate retroactively unless "required by express command or by necessary and unavoidable implication"); *Shwab* v. *Doyle,* 258 U. S. 529, 537 (1922) ("[A] statute should not be given a retrospective operation unless its words make that imperative"); see also *Bonjorno, supra,* at 842–844 (concurring opinion) (collecting cases applying the clear statement test). I do not deem that clear rule to be changed by the Court's dicta regarding legislative history in the present case.

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[1] In one respect, I must acknowledge, the Court's effort may be unique. There is novelty as well as irony in its supporting the judgment that the floor statements on the 1991 Act are unreliable by citing Senator Danforth's floor statement on the 1991 Act to the effect that floor statements on the 1991 Act are unreliable. See *ante*, at 262–263, n. 15.

The 1991 Act does not expressly state that it operates retroactively, but petitioner contends that its specification of prospective-only application for two sections, §§ 109(c) and 402(b), implies that its other provisions are retroactive. More precisely, petitioner argues that since § 402(a) states that "[e]xcept as otherwise specifically provided, [the 1991 Act] shall take effect upon enactment"; and since §§ 109(c) and 402(b) specifically provide that those sections shall operate only prospectively; the term "shall take effect upon enactment" in § 402(a) must mean *retroactive* effect. The short response to this refined and subtle argument is that refinement and subtlety are no substitute for clear statement. "[S]hall take effect upon enactment" is presumed to mean "shall have prospective effect upon enactment," and that presumption is too strong to be overcome by any negative inference derived from §§ 109(c) and 402(b).[2]

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[2] Petitioner suggests that in *Pennsylvania* v. *Union Gas Co.,* 491 U. S. 1 (1989), the Court found the negative implication of language sufficient to satisfy the "clear statement" requirement for congressional subjection of the States to private suit, see *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 242 (1985). However, in that case it was the express inclusion of States in the definition of potentially liable "person[s]," see 42 U. S. C. § 9601(21), as reinforced by the limitation of States' liability in certain limited circumstances, see § 9601(20)(D), that led the Court to find a plain statement of liability. See 491 U. S., at 11 (noting the "cascade of plain

II

The Court's opinion begins with an evaluation of petitioner's argument that the text of the statute dictates its retroactive application. The Court's rejection of that argument cannot be as forceful as it ought, so long as it insists upon compromising the clarity of the ancient and constant assumption that legislation is prospective, by attributing a comparable pedigree to the nouveau *Bradley* presumption in favor of applying the law in effect at the time of decision. See *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696, 711–716 (1974). As I have demonstrated elsewhere and need not repeat here, *Bradley* and *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), simply misread our precedents and invented an utterly new and erroneous rule. See generally *Bonjorno*, *supra*, at 840 (SCALIA, J., concurring).

Besides embellishing the pedigree of the *Bradley-Thorpe* presumption, the Court goes out of its way to reaffirm the holdings of those cases. I see nothing to be gained by overruling them, but neither do I think the indefensible should needlessly be defended. And *Thorpe*, at least, is really indefensible. The regulation at issue there required that "before *instituting an eviction proceeding* local housing authorities . . . should inform the tenant . . . of the reasons for the eviction . . . ." *Thorpe*, *supra*, at 272, and n. 8 (emphasis added). The Court imposed that requirement on an eviction proceeding *instituted 18 months before the regulation issued.* That application was plainly retroactive and was wrong. The result in *Bradley* presents a closer question; application of an attorney's fees provision to ongoing litigation is arguably not retroactive. If it *were* retroactive, however, it would surely not be saved (as the Court suggests) by the existence of another theory under which attorney's fees might have been discretionarily awarded, see *ante*, at 277–278.

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language" supporting liability); *id.*, at 30 (SCALIA, J., concurring in part and dissenting in part). There is nothing comparable here.

III

My last, and most significant, disagreement with the Court's analysis of this case pertains to the meaning of retroactivity. The Court adopts as its own the definition crafted by Justice Story in a case involving a provision of the New Hampshire Constitution that prohibited "retrospective" laws: a law is retroactive only if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Society for Propagation of the Gospel* v. *Wheeler,* 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814) (Story, J.).

One might expect from this "vested rights" focus that the Court would hold all changes in rules of procedure (as opposed to matters of substance) to apply retroactively. And one would draw the same conclusion from the Court's formulation of the test as being "whether the new provision attaches new legal consequences to events completed before its enactment"—a test borrowed directly from our *Ex Post Facto* Clause jurisprudence, see, *e. g., Miller* v. *Florida,* 482 U. S. 423, 430 (1987), where we have adopted a substantive-procedural line, see *id.,* at 433 ("[N]o *ex post facto* violation occurs if the change in the law is merely procedural"). In fact, however, the Court shrinks from faithfully applying the test that it has announced. It first seemingly defends the procedural-substantive distinction that a "vested rights" theory entails, *ante,* at 275 ("Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive"). But it soon acknowledges a broad and ill-defined (indeed, utterly undefined) exception: "[T]he mere fact that a new rule is procedural does not mean that it applies to every pending case." *Ante,* at 275, n. 29. Under this exception, "a new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed," *ibid.*, and "the promulgation of a new jury trial rule would ordinarily not warrant retrial of cases that had previously been tried to a judge," *ante*, at 281, n. 34. It is hard to see how either of these refusals to allow retroactive application preserves any "vested right." "'No one has a vested right in any given mode of procedure.'" *Ex parte Collett*, 337 U. S. 55, 71 (1949), quoting *Crane* v. *Hahlo*, 258 U. S. 142, 147 (1922).

The seemingly random exceptions to the Court's "vested rights" (substance-*vs.*-procedure) criterion must be made, I suggest, because that criterion is fundamentally wrong. It may well be that the upsetting of "vested substantive rights" was the proper touchstone for interpretation of New Hampshire's constitutional prohibition, as it is for interpretation of the United States Constitution's *Ex Post Facto* Clauses, see *ante*, at 275, n. 28. But I doubt that it has anything to do with the more mundane question before us here: absent clear statement to the contrary, what is the presumed temporal application of a statute? For purposes of *that* question, a *procedural* change should no more be presumed to be retroactive than a *substantive* one. The critical issue, I think, is not whether the rule affects "vested rights," or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to *testimony already taken*—reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.

The inadequacy of the Court's "vested rights" approach becomes apparent when a change in one of the incidents of trial alters substantive entitlements. The opinion classifies attorney's fees provisions as procedural and permits "retroactive" application (in the sense of application to cases involving preenactment conduct). See *ante,* at 277–278. It seems to me, however, that holding a person liable for attorney's fees affects a "substantive right" no less than holding him liable for compensatory or punitive damages, which the Court treats as affecting a vested right. If attorney's fees can be awarded in a suit involving conduct that antedated the fee-authorizing statute, it is because the purpose of the fee award is not to affect that conduct, but to encourage suit for the vindication of certain rights—so that the retroactivity event is the filing of suit, whereafter encouragement is no longer needed. Or perhaps because the purpose of the fee award is to *facilitate* suit—so that the retroactivity event is the termination of suit, whereafter facilitation can no longer be achieved.

The "vested rights" test does not square with our consistent practice of giving immediate effect to statutes that alter a court's jurisdiction. See, *e. g., Bruner* v. *United States,* 343 U. S. 112, 116–117, and n. 8 (1952); *Hallowell* v. *Commons,* 239 U. S. 506 (1916); cf. *Ex parte McCardle,* 7 Wall. 506, 514 (1869); *Insurance Co.* v. *Ritchie,* 5 Wall. 541, 544–545 (1867); see also *King* v. *Justices of the Peace of London,* 3 Burr. 1456, 97 Eng. Rep. 924 (K. B. 1764). The Court explains this aspect of our retroactivity jurisprudence by noting that "a new jurisdictional rule" will often not involve retroactivity in Justice Story's sense because it " 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " *Ante,* at 274, quoting *Hallowell, supra,* at 508. That may be true sometimes, but surely not always. A jurisdictional rule can deny a litigant a forum for his claim entirely, see Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U. S. C. §§251–262, or may leave him with an alternate forum that will deny relief for some collateral reason (*e. g.*, a statute of limitations bar). Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised. Thus, applying a jurisdiction-eliminating statute to undo past judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.

Finally, statutes eliminating previously available forms of prospective relief provide another challenge to the Court's approach. Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. See, *e. g.*, *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 464 (1921). The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operates only *in futuro*," *ibid.* Since the purpose of prospective relief is to affect the future rather than remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.[3]

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[3] A focus on the relevant retroactivity event also explains why the presumption against retroactivity is not violated by interpreting a statute to alter the future legal effect of past transactions—so-called secondary retroactivity, see *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 219–220 (1988) (SCALIA, J., concurring) (citing McNulty, Corporations and the Intertemporal Conflict of Laws, 55 Calif. L. Rev. 12, 58–60 (1967)); cf. *Cox* v. *Hart*, 260 U. S. 427, 435 (1922). A new ban on gambling applies to existing casinos and casinos under construction, see *ante*, at 269–270, n. 24, even though it "attaches a new disability" to those past investments. The

I do not maintain that it will always be easy to determine, from the statute's purpose, the relevant event for assessing its retroactivity. As I have suggested, for example, a statutory provision for attorney's fees presents a difficult case. Ordinarily, however, the answer is clear—as it is in both *Landgraf* and *Rivers* v. *Roadway Express, Inc., post,* p. 298. Unlike the Court, I do not think that any of the provisions at issue is "not easily classified," *ante,* at 281. They are all directed at the regulation of primary conduct, and the occurrence of the primary conduct is the relevant event.

JUSTICE BLACKMUN, dissenting.

Perhaps from an eagerness to resolve the "apparent tension," see *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno,* 494 U. S. 827, 837 (1990), between *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696 (1974), and *Bowen* v. *Georgetown Univ. Hospital,* 488 U. S. 204 (1988), the Court rejects the "most logical reading," *Kaiser,* 494 U. S., at 838, of the Civil Rights Act of 1991, 105 Stat. 1071 (Act), and resorts to a presumption against retroactivity. This approach seems to me to pay insufficient fidelity to the settled principle that the "starting point for interpretation of a statute 'is the language of the statute itself,'" *Kaiser,* 494 U. S., at 835, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U. S. 102, 108 (1980), and extends the presumption against retroactive legislation beyond its historical reach and purpose.

A straightforward textual analysis of the Act indicates that § 102's provision of compensatory damages and its attendant right to a jury trial apply to cases pending on appeal on the date of enactment. This analysis begins with § 402(a) of the Act, 105 Stat. 1099: "Except as otherwise specifically provided, this Act and the amendments made by this Act

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relevant retroactivity event is the primary activity of gambling, not the primary activity of constructing casinos.

shall take effect upon enactment." Under the "settled rule that a statute must, if possible, be construed in such fashion that every word has operative effect," *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 36 (1992), citing *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955), § 402(a)'s qualifying clause, "[e]xcept as otherwise specifically provided," cannot be dismissed as mere surplusage or an "insurance policy" against future judicial interpretation. Cf. *Gersman* v. *Group Health Assn., Inc.*, 975 F. 2d 886, 890 (CADC 1992). Instead, it most logically refers to the Act's two sections "specifically provid[ing]" that the statute does not apply to cases pending on the date of enactment: (a) § 402(b), 105 Stat. 1099, which provides, in effect, that the Act did not apply to the then-pending case of *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), and (b) § 109(c), 105 Stat. 1078, which states that the Act's protections of overseas employment "shall not apply with respect to conduct occurring before the date of the enactment of this Act." Self-evidently, if the entire Act were inapplicable to pending cases, §§ 402(b) and 109(c) would be "entirely redundant." *Kungys* v. *United States*, 485 U. S. 759, 778 (1988) (plurality opinion). Thus, the clear implication is that, while §§ 402(b) and 109(c) do not apply to pending cases, other provisions—including § 102—do.[1] "'Absent a clearly expressed legislative intention to the contrary, [this] language must . . . be regarded as conclusive.'" *Kaiser*, 494 U. S., at 835, quoting *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S., at 108. The legislative history of the Act, featuring a welter of conflicting and "some frankly partisan" floor statements, *ante*, at 262, but no committee report, evinces no such contrary legislative intent.[2] Thus, I see no reason to dismiss as "unlikely," *ante*, at 259, the most natural reading of the statute, in order to embrace some other reading that is also "possible," *ante*, at 260.

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[1] It is, of course, an "unexceptional" proposition that "a particular statute may in some circumstances *implicitly* authorize retroactive [application]." *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204, 223 (1988) (concurring opinion) (emphasis added).

Even if the language of the statute did not answer the retroactivity question, it would be appropriate under our precedents to apply § 102 to pending cases.[3] The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights. See, *e. g.*, Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 784 (1936) (retroactivity doctrine developed as an "inhibition against a construction which . . . would violate vested rights"). This presumption need not be applied to remedial legislation, such as § 102, that does not proscribe any conduct that was previously legal. See *Sampeyreac* v. *United States*, 7 Pet. 222, 238 (1833) ("Almost every law, providing a new remedy, affects and operates upon causes of action existing at the time the law is passed"); *Hastings* v. *Earth Satellite Corp.*, 628 F. 2d 85, 93 (CADC) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known"), cert. denied, 449 U. S. 905 (1980); 1 J. Kent, Commentaries on American Law *455–*456 (Chancellor Kent's objection to a law "affecting and changing vested rights" is "not understood to apply to *remedial* statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights").

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[2] Virtually every Court of Appeals to consider the application of the 1991 Act to pending cases has concluded that the legislative history provides no reliable guidance. See, *e. g., Gersman* v. *Group Health Assn., Inc.*, 975 F. 2d 886 (CADC 1992); *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929 (CA7 1992).

The absence in the Act of the strong retroactivity language of the vetoed 1990 legislation, which would have applied the new law to final judgments as well as to pending cases, see H. R. 4000, 101st Cong., 2d Sess., § 15(b)(3) (1990), reprinted at 136 Cong. Rec. H6829 (Aug. 3, 1990) (providing that "any final judgment entered prior to the date of the enactment of this Act as to which the rights of any of the parties thereto have become fixed and vested . . . shall be vacated in whole or in part if justice requires" and the Constitution permits), is not instructive of Congress' intent with respect to pending cases alone. Significantly, Congress also rejected language that put pending claims beyond the reach of the 1990 or 1991 Act. See *id.*, at H6747 (Michel-LaFalce amendment to 1990 Act) ("The amendments made by this Act shall not apply with respect to claims arising before the date of enactment of this Act"); *id.*, at H6768 (Michel-LaFalce amendment rejected); 137 Cong. Rec. S3023 (daily ed. Mar. 12, 1991) (Sen. Dole's introduction of S. 611, which included the 1990 Act's retroactivity provision); *id.*, at 13255, 13265–13266 (introduction and defeat of Michel substitute for H. R. 1).

[3] Directly at issue in this case are compensatory damages and the right to a jury trial. While there is little unfairness in requiring an employer to compensate the victims of intentional acts of discrimination, or to have a jury determine those damages, the imposition of punitive damages for preenactment conduct represents a more difficult question, one not squarely addressed in this case and one on which I express no opinion.

At no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment; "'there is no such thing as a vested right to do wrong.'" *Freeborn* v. *Smith*, 2 Wall. 160, 175 (1865). See also 2 N. Singer, Sutherland on Statutory Construction § 41.04, p. 349 (4th rev. ed. 1986) (procedural and remedial statutes that do not take away vested rights are presumed to apply to pending actions). Section 102 of the Act expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee's basic right to be free from discrimination or the employer's corresponding legal duty. There is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years.

Accordingly, I respectfully dissent.

RIVERS ET AL. *v.* ROADWAY EXPRESS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 92–938. Argued October 13, 1993—Decided April 26, 1994

Petitioners filed a complaint under, *inter alia,* 42 U. S. C. § 1981, alleging that respondent, their employer, had fired them on baseless charges because of their race and because they had insisted on the same procedural protections in disciplinary proceedings that were afforded white employees. Before the trial, this Court issued *Patterson* v. *McLean Credit Union,* 491 U. S. 164, 171, holding that § 1981's prohibition against racial discrimination in the making and enforcement of contracts does not apply to conduct that occurs after the formation of a contract and that does not interfere with the right to enforce established contract obligations. The District Court relied on *Patterson* in dismissing petitioners' discriminatory discharge claims. While their appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law, § 101 of which defines § 1981's "make and enforce contracts" phrase to embrace all phases and incidents of the contractual relationship, including discriminatory contract terminations. The Court of Appeals ruled, among other things, that § 1981 as interpreted in *Patterson,* not as amended by § 101, governed the case.

Held: Section 101 does not apply to a case that arose before it was enacted. Pp. 303–314.

(a) *Landgraf* v. *USI Film Products, ante,* p. 244, in which this Court concluded that § 102 of the 1991 Act does not apply to cases arising before its enactment, requires rejection of two of petitioners' submissions in this case: their negative implication argument based on §§ 402(a), 109(c), and 402(b), see *ante,* at 257–263, and their argument that *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696, controls here, rather than the presumption against statutory retroactivity. Pp. 303–304.

(b) The fact that § 101 was enacted in response to *Patterson* does not supply sufficient evidence of a clear congressional intent to overcome the presumption against statutory retroactivity. Even assuming that § 101 reflects disapproval of *Patterson*'s § 1981 interpretation, and that most legislators believed that the case was incorrectly decided and represented a departure from the previously prevailing understanding of § 1981's reach, the Act's text does not support petitioners' argument that § 101 was intended to "restore" that prior understanding *as to cases arising before the Act's passage.* In contrast to the 1990 civil rights bill that was vetoed by the President, the 1991 Act neither declares its intent to "restor[e]" protections that were limited by *Patterson* and other decisions nor provides that its § 1981 amendment applies to all proceedings "pending on or commenced after" the date *Patterson* was decided, but describes its function as "expanding" the scope of relevant civil rights statutes in order to provide adequate protection to discrimination victims. Taken by itself, the fact that § 101 is framed as a gloss on § 1981's original "make and enforce contracts" language does not demonstrate an intent to apply the new definition to past acts. Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question. The 1991 Act's legislative history does not bridge the textual gap, since the statements that most strongly support retroactivity are found in the debates on the *1990* bill, and the statements relating specifically to § 101 are conflicting and unreliable. Pp. 304–309.

(c) Contrary to petitioners' argument, this Court's decisions do not espouse a "presumption" in favor of the retroactive application of restorative statutes even in the absence of clear congressional intent. *Frisbie* v. *Whitney*, 9 Wall. 187, and *Freeborn* v. *Smith*, 2 Wall. 160, distinguished. A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but an intent to act retroactively in such cases must be based on clear evidence and may not be presumed. Since neither § 101 nor the statute of which it is a part contains such evidence, and since the section creates substantive liabilities that had no legal existence before the 1991 Act was passed, § 101 does not apply to preenactment conduct. Rather, *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in § 1981 before the 1991 amendment went into effect. Pp. 309–314.

973 F. 2d 490, affirmed and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *ante*, p. 286. BLACKMUN, J., filed a dissenting opinion, *post*, p. 314.

Eric Schnapper argued the cause for petitioners. With him on the briefs were *Elaine R. Jones*, *Charles Stephen Ralston*, *Cornelia T. L. Pillard*, *Kerry Scanlon*, and *Ellis Boal*.

Solicitor General Days argued the cause for the United States et al. as *amici curiae* urging reversal. On the brief were *Acting Solicitor General Bryson, Acting Assistant Attorney General Turner, Deputy Solicitor General Wallace, Robert A. Long, Jr., David K. Flynn, Dennis J. Dimsey, Rebecca K. Troth,* and *Donald R. Livingston.*

Glen D. Nager argued the cause for respondent. With him on the brief were *John T. Landwehr* and *Thomas J. Gibney.**

JUSTICE STEVENS delivered the opinion of the Court.

Section 101 of the Civil Rights Act of 1991, Pub. L. 102–166, 105 Stat. 1071, defines the term "make and enforce contracts" as used in § 1 of the Civil Rights Act of 1866, Rev. Stat. § 1977, 42 U. S. C. § 1981, to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." We granted certiorari to decide whether § 101 applies to a case that arose before it was enacted. We hold that it does not.

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*Briefs of *amici curiae* urging reversal were filed for the Asian American Legal Defense and Education Fund et al. by *Denny Chin, Doreena Wong,* and *Angelo N. Ancheta;* and for the National Women's Law Center et al. by *Judith E. Schaeffer* and *Ellen J. Vargyas.*

Briefs of *amici curiae* urging affirmance were filed for the American Trucking Associations et al. by *James D. Holzhauer, Andrew L. Frey, Kenneth S. Geller, Javier H. Rubinstein, Daniel R. Barney,* and *Kenneth P. Kolson;* and for Motor Express, Inc., by *Alan J. Thiemann.*

Briefs of *amici curiae* were filed for the Equal Employment Advisory Council et al. by *Robert E. Williams, Douglas S. McDowell,* and *Mona C. Zeiberg;* for the National Association for the Advancement of Colored People et al. by *Marc L. Fleischaker, David L. Kelleher, Steven S. Zaleznick, Cathy Ventrell-Monsees, Steven M. Freeman, Michael Lieberman, Dennis Courtland Hayes, Willie Abrams, Samuel Rabinove,* and *Richard Foltin;* and for Wards Cove Packing Co. by *Douglas M. Fryer, Douglas M. Duncan,* and *Richard L. Phillips.*

I

Petitioners Rivers and Davison were employed by respondent Roadway Express, Inc., as garage mechanics. On the morning of August 22, 1986, a supervisor directed them to attend disciplinary hearings later that day. Because they had not received the proper notice guaranteed by their collective-bargaining agreement, petitioners refused to attend. They were suspended for two days, but filed grievances and were awarded two days' backpay. Respondent then held another disciplinary hearing, which petitioners also refused to attend, again on the ground that they had not received proper notice. Respondent thereupon discharged them.

On December 22, 1986, petitioners filed a complaint alleging that respondent had discharged them because of their race in violation of 42 U. S. C. § 1981.[1] They claimed, *inter alia,* that they had been fired on baseless charges because of their race and because they had insisted on the same procedural protections afforded white employees.

On June 15, 1989, before the trial commenced, this Court announced its decision in *Patterson* v. *McLean Credit Union,* 491 U. S. 164. *Patterson* held that § 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." *Id.,* at 171. Relying on *Patterson,* the District Court held that none of petitioners' discriminatory discharge claims were covered by § 1981, and dismissed their claims under that section. After a bench trial on petitioners' Title VII claims, the District Court found that petitioners had been discharged for reasons other than their race, and entered judgment for respondent.

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[1] Petitioners' amended complaint also alleged claims against respondent under the Labor Management Relations Act, 1947, 61 Stat. 157, as amended, 29 U. S. C. § 185(a), and Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.,* as well as claims against their union. Those claims are not before us.

On appeal, petitioners contended that the District Court had misconstrued their complaint: They had not merely claimed discriminatory discharge, but more specifically had alleged that respondent had retaliated against them, because of their race, for attempting to enforce their procedural rights under the collective-bargaining agreement. Because that allegation related to "enforcement" of the labor contract, petitioners maintained, it stated a § 1981 claim even under *Patterson's* construction of the statute. While petitioners' appeal was pending, the Civil Rights Act of 1991 (1991 Act or Act) became law. Section 101 of that Act provides that § 1981's prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations.[2] Petitioners accordingly filed a supplemental brief advancing the argument that the new statute applied in their case. The Court of Appeals agreed with petitioners' first contention but not the second. Accordingly, it ruled that § 1981 as interpreted in *Patterson,* not as amended by § 101, governed the case and remanded for a jury trial limited to petitioners' discrimination-in-contract-enforcement claim. See *Harvis* v. *Roadway Express, Inc.*, 973 F. 2d 490 (CA6 1992).

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[2] The full text of § 101, which is entitled "Prohibition Against All Racial Discrimination in the Making And Enforcement of Contracts," reads as follows:

"Section 1977 of the Revised Statutes (42 U. S. C. 1981) is amended—

"(1) by inserting '(a)' before 'All persons within'; and

"(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

Prior to the 1991 amendment, § 1981 provided:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The history of § 1981, which is sometimes cited as § 1977 of the Revised Statutes, is set forth in *Runyon* v. *McCrary*, 427 U. S. 160, 168–170, and n. 8 (1976).

We granted certiorari, 507 U. S. 908 (1993), on the sole question whether § 101 of the 1991 Act applies to cases pending when it was enacted and set the case for argument with *Landgraf* v. *USI Film Products, ante,* p. 244.

II

In *Landgraf,* we concluded that § 102 of the 1991 Act does not apply to cases that arose before its enactment. The reasons supporting that conclusion also apply to § 101, and require rejection of two of petitioners' submissions in this case. First, these petitioners, like the petitioner in *Landgraf,* rely heavily on a negative implication argument based on §§ 402(a), 109(c), and 402(b) of the Act. That argument, however, is no more persuasive as to the application of § 101 to preenactment conduct than as to that of § 102. See *ante,* at 257–263.

Second, petitioners argue that the case is governed by *Bradley* v. *School Bd. of Richmond,* 416 U. S. 696 (1974), rather than the presumption against statutory retroactivity. We are persuaded, however, that the presumption is even more clearly applicable to § 101 than to § 102. Section 102 altered the liabilities of employers under Title VII by subjecting them to expanded monetary liability, but it did not alter the normative scope of Title VII's prohibition on workplace discrimination. In contrast, because § 101 amended § 1981 to embrace all aspects of the contractual relationship, including contract terminations, it enlarged the category of conduct that is subject to § 1981 liability.

Moreover, § 1981 (and hence § 101) is not limited to employment; because it covers *all* contracts, see, *e. g., Runyon* v. *McCrary,* 427 U. S. 160 (1976), *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.,* 410 U. S. 431 (1973), a substantial part of § 101's sweep does not overlap Title VII. In short, § 101 has the effect not only of increasing liability but also of establishing a new standard of conduct.[3] Accordingly, for reasons we stated in *Landgraf,* the important new legal obligations § 101 imposes bring it within the class of laws that are presumptively prospective.

III

Petitioners rely heavily on an argument that was not applicable to § 102 of the 1991 Act, the section at issue in *Landgraf.* They contend that § 101 should apply to their case because it was "restorative" of the understanding of § 1981 that prevailed before our decision in *Patterson.* Petitioners advance two variations on this theme: Congress' evident purpose to "restore" pre-*Patterson* law indicates that it affirmatively *intended* § 101 to apply to cases arising before its enactment;[4] moreover, there is a "presumption in favor of application of restorative statutes" to cases arising before their enactment. Brief for Petitioners 37.

A

Congress' decision to alter the rule of law established in one of our cases—as petitioners put it, to "legislatively overrul[e]," see *id.,* at 38—does not, by itself, reveal whether Congress intends the "overruling" statute to apply retroactively to events that would otherwise be governed by the judicial decision.[5] A legislative response does not necessarily indicate that Congress viewed the judicial decision as "wrongly decided" as an interpretive matter. Congress may view the judicial decision as an entirely correct reading of prior law—or it may be altogether indifferent to the decision's technical merits—but may nevertheless decide that the old law should be amended, but only for the future. Of course, Congress may also decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision. Because retroactivity raises special policy concerns, the choice to enact a statute that responds to a judicial decision is quite distinct from the choice to make the responding statute retroactive.

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[3] Even in the employment context, § 1981's coverage is broader than Title VII's, for Title VII applies only to employers with 15 or more employees, see 42 U. S. C. § 2000e(b), whereas § 1981 has no such limitation.

[4] See Brief for Petitioners 35 ("Congress sought to restore what it and virtually all the lower courts thought had been the reach of § 1981 prior to *Patterson*").

Petitioners argue that the structure and legislative history of § 101 indicate that Congress specifically intended to "restore" prior law even as to parties whose rights would otherwise have been determined according to *Patterson*'s interpretation of § 1981. Thus, § 101 operates as a gloss on the terms "make and enforce contracts," the original language of the Civil Rights Act of 1866 that was before this Court in *Patterson*. Petitioners also point to evidence in the 1991 Act's legislative history indicating legislators' distress with *Patterson*'s construction of § 1981 and their view that our decision had narrowed a previously established understanding of that provision.[6] Taken together, petitioners argue, this evidence shows that it was Congress' sense that *Patterson* had cut back the proper scope of § 1981, and that the new legislation would restore its proper scope. Regardless of whether that sense was right or wrong as a technical legal matter, petitioners maintain, we should give it effect by applying § 101's broader definition of what it means to "make and enforce" a contract, rather than *Patterson's* congressionally disapproved reading, to cases pending upon § 101's enactment.

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[5] Congress frequently "responds" to judicial decisions construing statutes, and does so for a variety of reasons. According to one commentator, between 1967 and 1990, the Legislature "overrode" our decisions at an average of "ten per Congress." Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L. J. 331, 338 (1991). Seldom if ever has Congress responded to so many decisions in a single piece of legislation as it did in the Civil Rights Act of 1991. See *Landgraf* v. *USI Film Products*, *ante*, at 250–251.

We may assume, as petitioners argue, that § 101 reflects congressional disapproval of *Patterson's* interpretation of

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[6] Thus, for example, the Senate Report on the 1990 civil rights bill that was passed by Congress but vetoed by the President stated:

"The *Patterson* decision sharply cut back on the scope and effectiveness of section 1981, with profoundly negative consequences both in the employment context and elsewhere. As a result of the decision, the more than 11 million employees in firms that are not covered by Title VII lack *any* protection against racial harassment and other forms of race discrimination on the job.

. . . . .

"Since *Patterson* was announced, more than 200 claims of race discrimination have been dismissed by federal courts as a result of the decision. Statement of Julius LeVonne Chambers, Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (March 9, 1990). Many persons subjected to blatant bigotry lack any means to obtain relief.

. . . . .

"The Committee finds that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in contracts." S. Rep. No. 101–315, pp. 12–14 (1990).

Congress' concern with the effects of the *Patterson* decision in specific cases, including cases in which plaintiffs had won judgments only to have them reversed after *Patterson* came down, see S. Rep. No. 315, at 13–14, doubtless explains why the 1990 legislation contained a special provision for the reopening of judgments. See Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., § 15(b)(3) (1990); see also *Landgraf, ante,* at 255–256, n. 8. Petitioners do not argue that the 1991 Act should be read to reach cases finally decided.

§ 1981. We may even assume that many or even most legislators believed that *Patterson* was not only incorrectly decided but also represented a departure from the previously prevailing understanding of the reach of § 1981. Those assumptions would readily explain why Congress might have wanted to legislate retroactively, thereby providing relief for the persons it believed had been wrongfully denied a § 1981 remedy. Even on those assumptions, however, we cannot find in the 1991 Act any clear expression of congressional intent to reach cases that arose before its enactment.

The 1990 civil rights bill that was vetoed by the President contained an amendment to § 1981, identical to § 101 of the 1991 Act, that assuredly would have applied to pending cases. See Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess., § 12 (1990). See also *Landgraf, ante,* at 255–256, n. 8. In its statement of purposes, the bill unambiguously declared that it was intended to "respond to the Supreme Court's recent decisions by *restoring* the civil rights protections that were dramatically limited by those decisions," S. 2104, § 2(b)(1) (emphasis added), and the section responding to *Patterson* was entitled "*Restoring* Prohibition Against All Racial Discrimination in the Making and Enforcement of Contracts." *Id.,* § 12 (emphasis added).[7] More directly, § 15(a)(6) of the 1990 bill expressly provided that the amendment to § 1981 "shall apply to all proceedings pending on or commenced after" the date of the *Patterson* decision.

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[7] We do not suggest that Congress' use of the word "restore" necessarily bespeaks an intent to restore *retroactively.* For example, Congress might, in response to a judicial decision that construed a criminal statute narrowly, amend the legislation to broaden its scope; the preamble or legislative history of the amendment might state that it was intended to "restore" the statute to its originally intended scope. In such a situation, there would be no need to read Congress' use of the word "restore" as an attempt to circumvent the *Ex Post Facto* Clause. Instead, "to restore" might sensibly be read as meaning "to correct, from now on." The 1990 bill did not suffer from such ambiguity, however, for it contained other provisions that made pellucidly clear that Congress contemplated the broader, retroactive kind of "restoration."

The statute that was actually enacted in 1991 contains no comparable language. Instead of a reference to "restoring" pre-existing rights, its statement of purposes describes the Act's function as "*expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." 1991 Act, § 3(4), 105 Stat. 1071 (emphasis added). Consistently with that revised statement of purposes, the Act lacks any direct reference to cases arising before its enactment, or to the date of the *Patterson* decision. Taken by itself, the fact that § 101 is framed as a gloss on § 1981's original "make and enforce contracts" does not demonstrate an intent to apply the new definition to past acts. Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question. Thus, the text of the Act does not support the argument that § 101 of the 1991 Act was intended to "restore" prior understandings of § 1981 *as to cases arising before the 1991 Act's passage.*

The legislative history of the 1991 Act does not bridge the gap in the text. The statements that most strongly support such coverage are found in the debates on the *1990* bill. See n. 6, *supra.* Such statements are of questionable relevance to the 1991 Act, however, because the 1990 provision contained express retroactivity provisions that were omitted from the 1991 legislation. The statements relating specifically to § 101 of the 1991 Act do not provide reliable evidence on whether Congress intended to "restore" a broader meaning of § 1981 with respect to pending cases otherwise governed by *Patterson*'s construction of the scope of the phrase "make and enforce contracts."[8] Thus, the fact that § 101 was enacted in response to *Patterson* does not supply sufficient evidence of a clear congressional intent to overcome the presumption against statutory retroactivity.

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[8] The legislative history of the 1991 Act reveals conflicting views about whether § 101 would "restore" or instead "enlarge" the original scope

B

A lack of clear congressional intent would not be dispositive if, as petitioners argue, § 101 is the kind of restorative statute that should presumptively be applied to pending cases. Petitioners maintain that restorative statutes do not implicate fairness concerns relating to retroactivity at least when, as is the case in this litigation, the new statute simply enacts a rule that the parties believed to be the law when they acted.[9] Indeed, *amici* in support of petitioners contend, fairness concerns positively favor application of § 101 to pending cases because the effect of the *Patterson* decision

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of § 1981. Compare, *e. g.*, 137 Cong. Rec. H9526 (Nov. 7, 1991) (remarks of Rep. Edwards), with *id.*, at H9543 (Nov. 7, 1991) (remarks of Rep. Hyde). The history also includes some debate over the proper test for *courts* to apply—specifically, the "*Bradley*" presumption or the "*Bowen*" presumption, see *Landgraf, ante,* at 263–265—to determine the applicability of the various provisions of the Act to pending cases. Compare, *e. g.*, 137 Cong. Rec. 30340 (1991) (remarks of Sen. Kennedy) (citing *Bradley* test), with *id.*, at 29043–29044 (remarks of Sen. Danforth) (favoring *Bowen* test). As we noted in *Landgraf, ante,* at 262–263, the legislative history reveals that retroactivity was recognized as an important and controversial issue, but that history falls far short of providing evidence of an agreement among legislators on the subject.

[9] They point out that respondent has no persuasive claim to unfair surprise, because, at the time the allegedly discriminatory discharge occurred, the Sixth Circuit precedent held that § 1981 could support a claim for discriminatory contract termination. See, *e. g.*, *Cooper* v. *North Olmstead,* 795 F. 2d 1265, 1270, n. 3 (1986); *Leonard* v. *City of Frankfort Elec. and Water Plant Bd.*, 752 F. 2d 189, 195 (1985). See also *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929, 941 (CA7 1992) (Cudahy, J., dissenting); *Gersman* v. *Group Health Assn., Inc.*, 975 F. 2d 886, 907–908 (CADC 1992) (Wald, J., dissenting), cert. pending, No. 92–1190. We note, however, that this argument would not apply to any cases arising after *Patterson* was decided but before the 1991 Act's enactment.

was to cut off, after the fact, rights of action under § 1981 that had been widely recognized in the lower courts, and under which many victims of discrimination had won damages judgments prior to *Patterson.* See Brief for NAACP et al. as *Amici Curiae* 7–14.

Notwithstanding the equitable appeal of petitioners' argument, we are convinced that it cannot carry the day. Our decisions simply do not support the proposition that we have espoused a "presumption" in favor of retroactive application of restorative statutes. Petitioners invoke *Frisbie* v. *Whitney,* 9 Wall. 187 (1870), which involved a federal statute that enabled Frisbie and others to acquire property they had occupied and thought they owned prior to 1862, when, in another case, this Court held that the original grant of title by the Mexican Government was void.[10] The new law in effect "restored" rights that Frisbie reasonably and in good faith thought he possessed before the surprising announcement of our decision. In the *Frisbie* case, however, the question was whether Congress had the *power* to enact legislation that had the practical effect of restoring the status quo retroactively. As the following passage from *Frisbie* demonstrates, there was no question about Congress' actual intent:

> "We say the benefits it designed to confer, because we entertain no doubt of the *intention* of Congress to secure to persons situated as Frisbie was, the title to their lands, on compliance with the terms of the act, and if this has not been done it is solely because Congress

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[10] See *United States* v. *Vallejo,* 1 Black 541 (1862). In his dissent in that case, Justice Grier stated that he could not "agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many millions, on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated." *Id.,* at 555–556 (emphasis in original).

> had no power to enact the law in question." *Id.*, at 192 (emphasis in original).

Petitioners also point to *Freeborn* v. *Smith*, 2 Wall. 160 (1865). There, a statute admitting Nevada to the Union had failed to provide for jurisdiction over cases arising from Nevada Territory that were pending before this Court when Nevada achieved statehood. We upheld against *constitutional* attack a subsequent statute explicitly curing the "accidental impediment" to our jurisdiction over such cases. See *id.*, at 173–175.

In the case before us today, however, we do not question the power of Congress to apply its definition of the term "make and enforce contracts" to cases arising before the 1991 Act became effective, or, indeed, to those that were pending on June 15, 1989, when *Patterson* was decided. The question is whether Congress has manifested such an intent. Unlike the narrow error-correcting statutes at issue in *Frisbie* and *Freeborn*, § 101 is plainly not the sort of provision that must be read to apply to pending cases "because a contrary reading would render it ineffective." *Landgraf*, *ante*, at 286. Section 101 is readily comprehensible, and entirely effective, even if it applies only to conduct occurring after its effective date. A restorative purpose may be relevant to whether Congress specifically intended a new statute to govern past conduct, but we do not "presume" an intent to act retroactively in such cases.[11] We still require clear evidence of intent to impose the restorative statute "retroactively." Section 101, and the statute of which it is a part, does not contain such evidence.

"The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student," *United States* v. *Security Industrial Bank,* 459 U. S. 70, 79 (1982), and this case illustrates the second half of that principle as well as the first. Even though applicable Sixth Circuit precedents were otherwise when this dispute arose, the District Court properly applied *Patterson* to this case. See *Harper* v. *Virginia Dept. of Taxation,* 509 U. S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). See also *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 372 (1910) ("Judicial decisions have had retrospective operation for near a thousand years") (Holmes, J., dissenting). The essence of judicial decisionmaking—applying general rules to particular situations—necessarily involves some peril to individual expectations because it is often difficult to predict the precise application of a general rule until it has been distilled in the crucible of litigation. See L. Fuller, Morality of Law 56 (1964) ("No system of law—whether it be judge-made or legislatively enacted—can be so perfectly drafted as to leave no room for dispute").

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[11] See N. Singer, Sutherland on Statutory Construction § 27.04, p. 472 (5th ed. 1993) ("The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate. Where such statutes are given any effect, the effect is prospective only").

Patterson did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of the Courts of Appeals which read § 1981 to cover discriminatory contract termination were *incorrect.* They were not wrong according to some abstract standard of interpretive validity, but by the rules that necessarily govern our hierarchical federal court system. Cf. *Brown* v. *Allen,* 344 U. S. 443, 540 (1953) (Jackson, J., concurring in result). It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.[12] Thus, *Patterson* provides the authoritative interpretation of the phrase "make and enforce contracts" in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991. That interpretation provides the baseline for our conclusion that the 1991 amendment would be "retroactive" if applied to cases arising before that date.

Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product. No such change, however, has the force of law unless it is implemented through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear. We cannot say that such an intent clearly appears with respect to § 101. For this reason, and because it creates liabilities that had no legal existence before the Act was passed, § 101 does not apply to preenactment conduct.

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[12] When Congress enacts a new statute, it has the power to decide when the statute will become effective. The new statute may govern from the date of enactment, from a specified future date, or even from an expressly announced earlier date. But when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted. Thus, it is not accurate to say that the Court's decision in *Patterson* "changed" the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress.

Accordingly, the judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[For opinion of JUSTICE SCALIA concurring in the judgment, see *ante*, p. 286.]

JUSTICE BLACKMUN, dissenting.

For the reasons stated in my dissent in *Landgraf* v. *USI Film Products*, *ante*, p. 294, I also dissent in this case. Here, just as in *Landgraf*, the most natural reading of the Civil Rights Act of 1991, 105 Stat. 1071, and this Court's precedents is that § 101 applies to cases pending on appeal on the statute's enactment date, at least where application of the new provision would not disturb the parties' vested rights or settled expectations. This is such a case.

In 1986, when respondent Roadway Express, Inc., discharged petitioners Maurice Rivers and Robert C. Davison from their jobs as garage mechanics, 42 U. S. C. § 1981, which gives all persons the same right to "make and enforce contracts,"[1] was widely understood to apply to the discriminatory enforcement and termination of employment contracts. See *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454, 459–460 (1975) ("Although this Court has not specifically so held, it is well settled among the Federal Courts of Appeals—and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race"). This understanding comports with § 101 of the Civil Rights Act of 1991, 105 Stat. 1072, providing that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." The majority seemingly accepts petitioners' argument that if this Court were to apply § 101 to their case, "respondent has no persuasive claim to unfair surprise, because, at the time the allegedly discriminatory discharge occurred, the Sixth Circuit precedent held that § 1981 could support a claim for discriminatory contract termination." *Ante*, at 309, n. 9.

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[1] Until the 1991 amendment, § 1981 stated: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

Nonetheless, applying a new, supercharged version of our traditional presumption against retroactive legislation, the Court concludes that petitioners, whose claim was pending when this Court announced *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989), are bound by that decision, which limited § 1981 to contract formation. *Patterson*'s tenure was—or surely should have been—brief, as § 101 was intended to overrule *Patterson* and to deny it further effect. The Court's holding today, however, prolongs the life of that congressionally repudiated decision. See *Estate of Reynolds* v. *Martin*, 985 F. 2d 470, 475–476 (CA9 1993) (denying application of § 101 to cases pending at its enactment would allow repudiated decisions, including *Patterson*, to "live on in the federal courts for . . . years").

Although the Court's opinions in this case and in *Landgraf* do bring needed clarity to our retroactivity jurisprudence, they do so only at the expense of stalling the intended application of remedial and restorative legislation. In its effort to reconcile the "apparent tension," *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U. S. 827, 837 (1990), between *Bradley* v. *School Bd. of Richmond*, 416 U. S. 696 (1974), and *Bowen* v. *Georgetown Univ. Hospital*, 488 U. S. 204 (1988), the Court loses sight of the core purpose of its retroactivity doctrine, namely, to respect and effectuate new laws to the extent consistent with congressional intent and with the vested rights and settled expectations of the parties. In *Bradley*, a unanimous Court applied an intervening statute allowing reasonable attorney's fees for school-desegregation plaintiffs to a case pending on appeal on the statute's effective date. The Court observed that the statute merely created an "additional basis or source for the Board's potential obligation to pay attorneys' fees." 416 U. S., at 721.[2] Just as the school board in *Bradley* was on notice that it could be liable for attorney's fees, the employer in this case was on notice—from the prevailing interpretation of § 1981—that it could be liable for damages for a racially discriminatory contract termination. Indeed, in this case, the employer's original liability stemmed from the very provision that petitioners now seek to enforce.

In *Bowen*, by contrast, the Court unanimously interpreted authorizing statutes not to permit the Secretary of Health and Human Services retroactively to change the rules for calculating hospitals' reimbursements for past services provided under Medicare. Although *Bowen* properly turned on the textual analysis of the applicable statutes, neither citing *Bradley* nor resorting to presumptions on retroactivity, its broad dicta disfavored the retroactive application of congressional enactments and administrative rules. See 488 U. S., at 208. *Bowen* is consistent, however, with the Court's analysis in *Bennett* v. *New Jersey*, 470 U. S. 632 (1985), appraising the "[p]ractical considerations," *id.*, at 640, that counsel against retroactive changes in federal grant programs and noting that such changes would deprive recipients of "fixed, predictable standards." *Ibid.* *Bowen* also accords with *Bradley*'s concern for preventing the injustice that would result from the disturbance of the parties' reasonable reliance. Thus, properly understood, *Bradley* establishes a presumption that new laws apply to pending cases in the absence of manifest injustice, and *Bowen* and *Bennett* stand for the corresponding presumption against applying new laws when doing so would cause the very injustice *Bradley* is designed to avoid.[3]

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[2] Here, of course, § 101 creates a basis or source—in addition to Title VII—for the prohibition on racial discrimination in the enforcement of employment contracts. Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2(a)(1).

Applying these principles here, "[w]hen a law purports to restore the status quo in existence prior to an intervening Supreme Court decision, the application of that law to conduct occurring prior to the decision would obviously not frustrate the expectations of the parties concerning the legal consequences of their actions at that time." *Gersman* v. *Group Health Assn., Inc.*, 975 F. 2d 886, 907 (CADC 1992) (dissenting opinion). While § 101 undoubtedly expands the scope of § 1981 to prohibit conduct that was not illegal under *Patterson*,[4] in the present context § 101 provides a remedy for conduct that was recognized as illegal when it occurred, both under § 1981 and under Title VII. Thus, as far as respondent is concerned, the law in effect when it dismissed petitioners' claim differs little from the law as amended by the Civil Rights Act of 1991, and application of § 101 in this case would neither alter the expectations of the parties nor disturb previously vested rights. Because I believe that the most faithful reading of our precedents makes this the appropriate inquiry, I would reverse the judgment of the Court of Appeals and remand the case for further proceedings.

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[3] An inquiry into the vested rights and settled expectations of the parties is fairer and more sensitive than a mechanical reliance on a substance/procedure dichotomy. See *Gersman* v. *Group Health Assn., Inc.*, 975 F. 2d 886, 906 (CADC 1992) (Wald, J., dissenting); *Mozee* v. *American Commercial Marine Service Co.*, 963 F. 2d 929, 940–941 (CA7 1992) (Cudahy, J., dissenting from denial of rehearing).

[4] Not all conduct proscribed by § 101 was also unlawful under Title VII or other civil rights laws. For example, § 101, unlike Title VII, see 42 U. S. C. § 2000e(b), applies to small employers, and even outside the employment context, see, *e. g.*, *Runyon* v. *McCrary*, 427 U. S. 160 (1976).

STANSBURY *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 93–5770. Argued March 30, 1994—Decided April 26, 1994

When California police first questioned petitioner Stansbury as a possible witness to the rape and murder of a 10-year-old girl, they had another suspect. However, Stansbury became a suspect during the interview, when he told police that, on the night of the murder, he drove a car matching the one seen where the girl's body was found. After he also admitted to prior convictions for rape, kidnaping, and child molestation, officers stopped the interview, advised him of his rights under *Miranda* v. *Arizona,* 384 U. S. 436, and arrested him. The trial court denied his pretrial motion to suppress his statements to the police, reasoning that he was not "in custody" for purposes of *Miranda* until the officers began to suspect him. He was convicted of, *inter alia,* first-degree murder and sentenced to death. In affirming, the State Supreme Court concluded that one of the relevant factors in determining whether Stansbury was in custody was whether the investigation was focused on him. Agreeing that suspicion focused on him only when he mentioned the car, the court found that *Miranda* did not bar the admission of statements made before that point.

Held: Because the initial determination of custody depends on the objective circumstances of the interrogation, an officer's subjective and undisclosed view concerning whether the interrogee is a suspect is irrelevant to the assessment whether that person is in custody. See, *e. g., Beckwith* v. *United States,* 425 U. S. 341. Numerous statements in the State Supreme Court's opinion are open to the interpretation that the court regarded the officers' subjective beliefs regarding Stansbury's status as a suspect as significant in and of themselves, rather than as relevant only to the extent they influenced the objective conditions surrounding his interrogation. The State Supreme Court should consider in the first instance whether objective circumstances show that Stansbury was in custody during the entire interrogation.

4 Cal. 4th 1017, 846 P. 2d 756, reversed and remanded.

Robert M. Westberg, by appointment of the Court, 510 U. S. 1009, argued the cause for petitioner. With him on the briefs were *David S. Winton* and *Joseph A. Hearst.*

Aileen Bunney, Deputy Attorney General of California, argued the cause for respondent. With her on the brief were *Daniel E. Lungren,* Attorney General, *George Williamson,* Chief Assistant Attorney General, *Ronald A. Bass,* Senior Assistant Attorney General, and *Ronald E. Niver,* Deputy Attorney General.*

PER CURIAM.

This case concerns the rules for determining whether a person being questioned by law enforcement officers is held in custody, and thus entitled to the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). We hold, not for the first time, that an officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment whether the person is in custody.

I

Ten-year-old Robyn Jackson disappeared from a playground in Baldwin Park, California, at around 6:30 p.m. on September 28, 1982. Early the next morning, about 10 miles away in Pasadena, Andrew Zimmerman observed a large man emerge from a turquoise American sedan and throw something into a nearby flood control channel. Zimmerman called the police, who arrived at the scene and discovered the girl's body in the channel. There was evidence that she had been raped, and the cause of death was determined to be asphyxia complicated by blunt force trauma to the head.

Lieutenant Thomas Johnston, a detective with the Los Angeles County Sheriff's Department, investigated the hom-

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*Briefs of *amici curiae* urging affirmance were filed for the Orange County District Attorney, State of California, by *Michael R. Capizzi* and *Devallis Rutledge;* for Americans for Effective Law Enforcement, Inc., by *Bernard J. Farber, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

icide. From witnesses interviewed on the day the body was discovered, he learned that Robyn had talked to two ice cream truck drivers, one being petitioner Robert Edward Stansbury, in the hours before her disappearance. Given these contacts, Johnston thought Stansbury and the other driver might have some connection with the homicide or knowledge thereof, but for reasons unimportant here Johnston considered only the other driver to be a leading suspect. After the suspect driver was brought in for interrogation, Johnston asked Officer Lee of the Baldwin Park Police Department to contact Stansbury to see if he would come in for questioning as a potential witness.

Lee and three other plainclothes officers arrived at Stansbury's trailer home at about 11:00 that evening. The officers surrounded the door and Lee knocked. When Stansbury answered, Lee told him the officers were investigating a homicide to which Stansbury was a possible witness and asked if he would accompany them to the police station to answer some questions. Stansbury agreed to the interview and accepted a ride to the station in the front seat of Lee's police car.

At the station, Lieutenant Johnston, in the presence of another officer, questioned Stansbury about his whereabouts and activities during the afternoon and evening of September 28. Neither Johnston nor the other officer issued *Miranda* warnings. Stansbury told the officers (among other things) that on the evening of the 28th he spoke with the victim at about 6:00, returned to his trailer home after work at 9:00, and left the trailer at about midnight in his housemate's turquoise, American-made car. This last detail aroused Johnston's suspicions, as the turquoise car matched the description of the one Andrew Zimmerman had observed in Pasadena. When Stansbury, in response to a further question, admitted to prior convictions for rape, kidnaping, and child molestation, Johnston terminated the interview and another officer advised Stansbury of his *Miranda* rights.

Stansbury declined to make further statements, requested an attorney, and was arrested. Respondent State of California charged Stansbury with first-degree murder and other crimes.

Stansbury filed a pretrial motion to suppress all statements made at the station, and the evidence discovered as a result of those statements. The trial court denied the motion in relevant part, ruling that Stansbury was not "in custody"—and thus not entitled to *Miranda* warnings—until he mentioned that he had taken his housemate's turquoise car for a midnight drive. Before that stage of the interview, the trial court reasoned, "the focus in [Lieutenant Johnston's] mind certainly was on the other ice cream [truck] driver," Tr. 2368; only "after Mr. Stansbury made the comment . . . describing the . . . turquoise-colored automobile" did Johnston's suspicions "shif[t] to Mr. Stansbury," *ibid.* Based upon its conclusion that Stansbury was not in custody until Johnston's suspicions had focused on him, the trial court permitted the prosecution to introduce in its case in chief the statements Stansbury made before that time. At trial, the jury convicted Stansbury of first-degree murder, rape, kidnaping, and lewd act on a child under the age of 14, and fixed the penalty for the first-degree murder at death.

The California Supreme Court affirmed. Before determining whether Stansbury was in custody during the interview at the station, the court set out what it viewed as the applicable legal standard:

> "In deciding the custody issue, the totality of the circumstances is relevant, and no one factor is dispositive. However, the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." 4 Cal. 4th 1017, 1050, 846 P. 2d 756, 775 (1993) (internal quotation marks omitted).

The court proceeded to analyze the second factor in detail, in the end accepting the trial court's factual determination "that suspicion focused on [Stansbury] only when he mentioned that he had driven a turquoise car on the night of the crime." *Id.*, at 1052, 846 P. 2d, at 776. The court "conclude[d] that [Stansbury] was not subject to custodial interrogation before he mentioned the turquoise car," and thus approved the trial court's ruling that *Miranda* v. *Arizona* did not bar the admission of statements Stansbury made before that point. 4 Cal. 4th, at 1054, 846 P. 2d, at 777–778.

We granted certiorari. 510 U. S. 943 (1993).

II

We held in *Miranda* that a person questioned by law enforcement officers after being "taken into custody or otherwise deprived of his freedom of action in any significant way" must first "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U. S., at 444. Statements elicited in noncompliance with this rule may not be admitted for certain purposes in a criminal trial. Compare *id.*, at 492, 494, with *Harris* v. *New York*, 401 U. S. 222 (1971). An officer's obligation to administer *Miranda* warnings attaches, however, "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U. S. 492, 495 (1977) *(per curiam);* see also *Illinois* v. *Perkins*, 496 U. S. 292, 296 (1990). In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)* (quoting *Mathiason, supra*, at 495).

Our decisions make clear that the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. In *Beckwith* v. *United States*, 425 U. S. 341 (1976), for example, the defendant, without being advised of his *Miranda* rights, made incriminating statements to Government agents during an interview in a private home. He later asked that *Miranda* "be extended to cover interrogation in noncustodial circumstances after a police investigation has focused on the suspect." 425 U. S., at 345 (internal quotation marks omitted). We found his argument unpersuasive, explaining that it "was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning." *Id.*, at 346–347 (internal quotation marks omitted). As a result, we concluded that the defendant was not entitled to *Miranda* warnings: "Although the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview . . . , he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." 425 U. S., at 347.

Berkemer v. *McCarty*, 468 U. S. 420 (1984), reaffirmed the conclusions reached in *Beckwith*. *Berkemer* concerned the roadside questioning of a motorist detained in a traffic stop. We decided that the motorist was not in custody for purposes of *Miranda* even though the traffic officer "apparently decided as soon as [the motorist] stepped out of his car that [the motorist] would be taken into custody and charged with a traffic offense." 468 U. S., at 442. The reason, we explained, was that the officer "never communicated his intention to" the motorist during the relevant questioning. *Ibid.* The lack of communication was crucial, for under *Miranda* "[a] policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time"; rather, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." 468 U. S., at 442. Other cases of ours have been consistent in adhering to this understanding of the custody element of *Miranda.* See, *e. g., Mathiason, supra,* at 495 ("Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody' "); *Beheler, supra,* at 1124, n. 2 ("Our holding in *Mathiason* reflected our earlier decision in *[Beckwith],* in which we rejected the notion that the 'in custody' requirement was satisfied merely because the police interviewed a person who was the 'focus' of a criminal investigation"); *Minnesota* v. *Murphy,* 465 U. S. 420, 431 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings, and the probation officer's knowledge and intent have no bearing on the outcome of this case") (citation omitted); cf. *Pennsylvania* v. *Bruder,* 488 U. S. 9, 11, n. 2 (1988).

It is well settled, then, that a police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda.* See F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 232, 236, 297–298 (3d ed. 1986). The same principle obtains if an officer's undisclosed assessment is that the person being questioned is not a suspect. In either instance, one cannot expect the person under interrogation to probe the officer's innermost thoughts. Save as they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry. "The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *Berkemer, supra,* at 435, n. 22.

An officer's knowledge or beliefs may bear upon the custody issue if they are conveyed, by word or deed, to the individual being questioned. Cf. *Michigan* v. *Chesternut,* 486 U. S. 567, 575, n. 7 (1988) (citing *United States* v. *Mendenhall,* 446 U. S. 544, 554, n. 6 (1980) (opinion of Stewart, J.)). Those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her "'freedom of action.'" *Berkemer, supra,* at 440. Even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. The weight and pertinence of any communications regarding the officer's degree of suspicion will depend upon the facts and circumstances of the particular case. In sum, an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned, may be one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave. (Of course, instances may arise in which the officer's undisclosed views are relevant in testing the credibility of his or her account of what happened during an interrogation; but it is the objective surroundings, and not any undisclosed views, that control the *Miranda* custody inquiry.)

We decide on this state of the record that the California Supreme Court's analysis of whether Stansbury was in custody is not consistent in all respects with the foregoing principles. Numerous statements in the court's opinion are open to the interpretation that the court regarded the officers' subjective beliefs regarding Stansbury's status as a suspect (or nonsuspect) as significant in and of themselves, rather than as relevant only to the extent they influenced the objective conditions surrounding his interrogation. See 4 Cal. 4th, at 1050, 846 P. 2d, at 775 ("whether the investigation ha[d] focused on the" person being questioned is among the "most important considerations" in assessing whether the person was in custody). So understood, the court's analysis conflicts with our precedents. The court's apparent conclusion that Stansbury's *Miranda* rights were triggered by virtue of the fact that he had become the focus of the officers' suspicions, see 4 Cal. 4th, at 1052, 1054, 846 P. 2d, at 776, 777–778; cf., *e. g., State* v. *Blanding,* 69 Haw. 583, 586–587, 752 P. 2d 99, 101 (1988); *State* v. *Hartman,* 703 S. W. 2d 106, 120 (Tenn. 1985), cert. denied, 478 U. S. 1010 (1986); *People* v. *Herdon,* 42 Cal. App. 3d 300, 307, n. 10, 116 Cal. Rptr. 641, 645, n. 10 (1974), is incorrect as well. Our cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda.* See generally 1 W. LaFave & J. Israel, Criminal Procedure §6.6(a), pp. 489–490 (1984).

The State acknowledges that Lieutenant Johnston's and the other officers' subjective and undisclosed suspicions (or lack thereof) do not bear upon the question whether Stansbury was in custody, for purposes of *Miranda,* during the station house interview. It maintains, however, that the objective facts in the record support a finding that Stansbury was not in custody until his arrest. Stansbury, by contrast, asserts that the objective circumstances show that he was in custody during the entire interrogation. We think it appropriate for the California Supreme Court to consider this question in the first instance. We therefore reverse its judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's *per curiam* opinion and merely add that, even if I were not persuaded that the judgment must be reversed for the reasons stated in that opinion, I would adhere to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution. See my dissent in *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994). I therefore would vacate the death sentence on that ground, too.

CITY OF CHICAGO ET AL. *v.* ENVIRONMENTAL DEFENSE FUND ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92–1639. Argued January 19, 1994—Decided May 2, 1994

Respondent Environmental Defense Fund (EDF) sued petitioners, the city of Chicago and its mayor, alleging that they were violating the Resource Conservation and Recovery Act of 1976 (RCRA) and implementing regulations of the Environmental Protection Agency (EPA) by using landfills not licensed to accept hazardous wastes as disposal sites for the toxic municipal waste combustion (MWC) ash that is left as a residue when the city's resource recovery incinerator burns household waste and nonhazardous industrial waste to produce energy. Although it was uncontested that, with respect to the ash, petitioners had not adhered to any of the RCRA Subtitle C requirements addressing hazardous wastes, the District Court granted them summary judgment on the ground that § 3001(i) of the Solid Waste Disposal Act, a provision within RCRA, excluded the ash from those requirements. The Court of Appeals disagreed and reversed, but, while certiorari was pending in this Court, the EPA issued a memorandum directing its personnel, in accordance with the agency's view of § 3001(i), to treat MWC ash as exempt from Subtitle C regulation. On remand following this Court's vacation of the judgment, the Court of Appeals reinstated its previous opinion, holding that, because the statute's plain language is dispositive, the EPA memorandum did not affect its analysis.

Held: Section 3001(i) does not exempt the MWC ash generated by petitioners' facility from Subtitle C regulation as hazardous waste. Although a pre-§ 3001(i) EPA regulation provided a "waste stream" exemption covering household waste from generation through treatment to final disposal of residues, petitioners' facility would not have come within that exemption because it burned something in addition to household waste; the facility would have been considered a Subtitle C hazardous waste generator, but not a (more stringently regulated) Subtitle C hazardous waste treatment, storage, and disposal facility, since all the waste it took in was nonhazardous. Section 3001(i) cannot be interpreted as extending the pre-existing waste-stream exemption to the product of a combined household/nonhazardous-industrial treatment facility such as petitioners'. Although the section is entitled "Clarification of household waste exclusion," its plain language—"A resource recovery facility . . . shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of [Subtitle C] regulation . . . if . . . such facility . . . receives and burns only . . . household waste . . . and [nonhazardous industrial] waste . . ."—establishes that its exemption is limited to the facility itself, not the ash that the facility generates. The statutory text's prominent omission of any reference to generation, not the single reference thereto in the legislative history, is the authoritative expression of the law. The enacted text requires rejection of the Government's plea for deference to the EPA's interpretation, which goes beyond the scope of whatever ambiguity § 3001(i) contains. Pp. 331–339.

985 F. 2d 303, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 340.

Lawrence Rosenthal argued the cause for petitioners. With him on the briefs were *Susan S. Sher, Benna Ruth Solomon,* and *Mardell Nereim.*

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Flint, Deputy Solicitor General Wallace, David C. Shilton, M. Alice Thurston, Gerald H. Yamada,* and *Lisa K. Friedman.*

Richard J. Lazarus argued the cause and filed a brief for respondents.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York by *Robert Abrams,* Attorney General, *Jerry Boone,* Solicitor General, *Peter H. Schiff,* Deputy Solicitor General, and *James A. Sevinsky* and *Kathleen Liston Morrison,* Assistant Attorneys General; for Barron County, Wisconsin, et al. by *Philip G. Sunderland, Max Rothal, Pamela K. Akin, Stephen O. Nunn, Cynthea L. Perry, Howard J. Wein, Charles H. Younger, John D. Pirich, David P. Bobzien, Felshaw King, Mary Anne Wood, Michael F. X. Gillin, Ruth C. Balkin, Patrick T. Boulden,* and *Barry S. Shanoff;* for the City of Spokane, Washington, et al. by *Craig S. Trueblood;* for the County of Westchester, New York, by *Carol L. Van Scoyoc;* for the National League of Cities et al. by *Richard Ruda, David R. Berz,* and *David B. Hird;* for the Washington Legal Foundation et

JUSTICE SCALIA delivered the opinion of the Court.

We are called upon to decide whether, pursuant to § 3001(i) of the Solid Waste Disposal Act (Resource Conservation and Recovery Act of 1976 (RCRA)), as added, 98 Stat. 3252, 42 U. S. C. § 6921(i), the ash generated by a resource recovery facility's incineration of municipal solid waste is exempt from regulation as a hazardous waste under Subtitle C of RCRA.

I

Since 1971, petitioner city of Chicago has owned and operated a municipal incinerator, the Northwest Waste-to-Energy Facility, that burns solid waste and recovers energy, leaving a residue of municipal waste combustion (MWC) ash. The facility burns approximately 350,000 tons of solid waste each year and produces energy that is both used within the facility and sold to other entities. The city has disposed of the combustion residue—110,000 to 140,000 tons of MWC ash per year—at landfills that are not licensed to accept hazardous wastes.

In 1988, respondent Environmental Defense Fund (EDF) filed a complaint against petitioners, the city of Chicago and its mayor, under the citizen suit provisions of RCRA, 42 U. S. C. § 6972, alleging that they were violating provisions of RCRA and of implementing regulations issued by the Environmental Protection Agency (EPA). Respondent alleged that the MWC ash generated by the facility was toxic enough to qualify as a "hazardous waste" under EPA's regulations, 40 CFR pt. 261 (1993). It was uncontested that, with respect to the ash, petitioners had not adhered to any of the requirements of Subtitle C, the portion of RCRA addressing hazardous wastes. Petitioners contended that

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al. by *Daniel J. Popeo, Paul D. Kamenar,* and *Kurt J. Olson;* and for Wheelabrator Technologies Inc., et al. by *Harold Himmelman, David M. Friedland,* and *Mark P. Paul.*

RCRA § 3001(i), 42 U. S. C. § 6921(i), excluded the MWC ash from those requirements. The District Court agreed with that contention, see *Environmental Defense Fund, Inc.* v. *Chicago,* 727 F. Supp. 419, 424 (1989), and subsequently granted petitioners' motion for summary judgment.

The Court of Appeals reversed, concluding that the "ash generated from the incinerators of municipal resource recovery facilities is subject to regulation as a hazardous waste under Subtitle C of RCRA." *Environmental Defense Fund, Inc.* v. *Chicago,* 948 F. 2d 345, 352 (CA7 1991). The city petitioned for a writ of certiorari, and we invited the Solicitor General to present the views of the United States. *Chicago* v. *Environmental Defense Fund, Inc.,* 504 U. S. 906 (1992). On September 18, 1992, while that invitation was outstanding, the Administrator of EPA issued a memorandum to EPA Regional Administrators, directing them, in accordance with the agency's view of § 3001(i), to treat MWC ash as exempt from hazardous waste regulation under Subtitle C of RCRA. Thereafter, we granted the city's petition, vacated the decision, and remanded the case to the Court of Appeals for the Seventh Circuit for further consideration in light of the memorandum. *Chicago* v. *Environmental Defense Fund,* 506 U. S. 982 (1992).

On remand, the Court of Appeals reinstated its previous opinion, holding that, because the statute's plain language is dispositive, the EPA memorandum did not affect its analysis. 985 F. 2d 303, 304 (CA7 1993). Petitioners filed a petition for writ of certiorari, which we granted. 509 U. S. 903 (1993).

II

RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U. S. C. §§ 6921–6934. (Nonhazardous wastes are regulated much more loosely under Subtitle D, 42 U. S. C. §§ 6941–6949.) Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, see 42 U. S. C. §§ 6922 and 6923, and owners and operators of hazardous waste treatment, storage, and disposal facilities (TSDF's), see § 6924. Pursuant to § 6922, EPA has directed hazardous waste generators to comply with handling, recordkeeping, storage, and monitoring requirements, see 40 CFR pt. 262 (1993). TSDF's, however, are subject to much more stringent regulation than either generators or transporters, including a 4- to 5-year permitting process, see 42 U. S. C. § 6925; 40 CFR pt. 270 (1993); U. S. Environmental Protection Agency Office of Solid Waste and Emergency Response, The Nation's Hazardous Waste Management Program at a Crossroads, The RCRA Implementation Study 49–50 (July 1990), burdensome financial assurance requirements, stringent design and location standards, and, perhaps most onerous of all, responsibility to take corrective action for releases of hazardous substances and to ensure safe closure of each facility, see 42 U. S. C. § 6924; 40 CFR pt. 264 (1993). "[The] corrective action requirement is one of the major reasons that generators and transporters work diligently to manage their wastes so as to avoid the need to obtain interim status or a TSD permit." 3 Environmental Law Practice Guide § 29.06[3][d] (M. Gerrard ed. 1993) (hereinafter Practice Guide).

RCRA does not identify which wastes are hazardous and therefore subject to Subtitle C regulation; it leaves that designation to EPA. 42 U. S. C. § 6921(a). When EPA's hazardous waste designations for solid wastes appeared in 1980, see 45 Fed. Reg. 33084, they contained certain exceptions from normal coverage, including an exclusion for "household waste," defined as "any waste material . . . derived from households (including single and multiple residences, hotels and motels)," *id.*, at 33120, codified as amended at 40 CFR § 261.4(b)(1) (1993). Although most household waste is harmless, a small portion—such as cleaning fluids and batteries—would have qualified as hazardous waste. The regulation declared, however, that "[h]ousehold waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (e. g., refuse-derived fuel) or reused" is not hazardous waste. *Ibid.* Moreover, the preamble to the 1980 regulations stated that "residues remaining after treatment (*e. g.* incineration, thermal treatment) [of household waste] are not subject to regulation as a hazardous waste." 45 Fed. Reg. 33099. By reason of these provisions, an incinerator that burned only household waste would not be considered a Subtitle C TSDF, since it processed only nonhazardous (*i. e.*, household) waste, and it would not be considered a Subtitle C generator of hazardous waste and would be free to dispose of its ash in a Subtitle D landfill.

The 1980 regulations thus provided what is known as a "waste stream" exemption for household waste, *ibid.*, *i. e.*, an exemption covering that category of waste from generation through treatment to final disposal of residues. The regulation did not, however, exempt MWC ash from Subtitle C coverage if the incinerator that produced the ash burned anything *in addition to* household waste, such as what petitioners' facility burns: nonhazardous industrial waste. Thus, a facility like petitioners' would qualify as a Subtitle C hazardous waste generator if the MWC ash it produced was sufficiently toxic, see 40 CFR §§261.3, 261.24 (1993)—though it would still not qualify as a Subtitle C TSDF, since all the waste it took in would be characterized as nonhazardous. (An ash can be hazardous, even though the product from which it is generated is not, because in the new medium the contaminants are more concentrated and more readily leachable, see 40 CFR §§261.3, 261.24, and pt. 261, App. II (1993).)

Four years after these regulations were issued, Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. 98–616, 98 Stat. 3221, which added to RCRA the "Clarification of Household Waste Exclusion" as § 3001(i), § 223, 98 Stat. 3252. The essence of our task in this case is to determine whether, under that provision, the MWC ash generated by petitioners' facility—a facility that would have been considered a Subtitle C generator under the 1980 regulations—is subject to regulation as hazardous waste under Subtitle C. We conclude that it is.

Section 3001(i), 42 U. S. C. § 6921(i), entitled "Clarification of household waste exclusion," provides:

> "A resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter, if—
>
> "(1) such facility—
>
> "(A) receives and burns only—
>
> "(i) household waste (from single and multiple dwellings, hotels, motels, and other residential sources), and
>
> "(ii) solid waste from commercial or industrial sources that does not contain hazardous waste identified or listed under this section, and
>
> "(B) does not accept hazardous wastes identified or listed under this section, and
>
> "(2) the owner or operator of such facility has established contractual requirements or other appropriate notification or inspection procedures to assure that hazardous wastes are not received at or burned in such facility."

The plain meaning of this language is that so long as a facility recovers energy by incineration of the appropriate wastes, *it* (the *facility*) is not subject to Subtitle C regulation as a facility that treats, stores, disposes of, or manages hazardous waste. The provision quite clearly does *not* contain any exclusion for the *ash itself.* Indeed, the waste the facility produces (as opposed to that which it receives) is not even mentioned. There is thus no express support for petitioners' claim of a waste-stream exemption.[1]

Petitioners contend, however, that the practical effect of the statutory language is to exempt the ash by virtue of exempting the facility. If, they argue, the facility is not deemed to be treating, storing, or disposing of hazardous waste, then the ash that it treats, stores, or disposes of must itself be considered nonhazardous. There are several problems with this argument. First, as we have explained, the only exemption provided by the terms of the statute is for the *facility.* It is the facility, *not the ash,* that "shall not be deemed" to be subject to regulation under Subtitle C. *Unlike* the preamble to the 1980 regulations, which had been in existence for four years by the time §3001(i) was enacted, §3001(i) does not explicitly exempt MWC ash generated by a resource recovery facility from regulation as a hazardous waste. In light of that difference, and given the statute's express declaration of national policy that "[w]aste that is . . . generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment," 42 U. S. C. §6902(b), we cannot interpret the statute to permit MWC ash sufficiently toxic to qualify as hazardous to be disposed of in ordinary landfills.

Moreover, as the Court of Appeals observed, the statutory language does not even exempt the *facility* in its capacity as a *generator* of hazardous waste. RCRA defines "generation" as "the act or process of producing hazardous waste." 42 U. S. C. §6903(6). There can be no question that the creation of ash by incinerating municipal waste constitutes "generation" of hazardous waste (assuming, of course, that the ash qualifies as hazardous under 42 U. S. C. §6921 and its implementing regulations, 40 CFR pt. 261 (1993)). Yet although §3001(i) states that the exempted facility "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes," it significantly omits from the catalog the word "*generating.*" Petitioners say that because the activities listed as exempt encompass the full scope of the facility's operation, the failure to mention the activity of generating is insignificant. But the statute itself refutes this. Each of the three specific terms used in §3001(i)—"treating," "storing," and "disposing of"—is separately defined by RCRA, and none covers the production of hazardous waste.[2] The fourth and less specific term ("otherwise managing") is also defined, to mean "collection, source separation, storage, transportation, processing, treatment, recovery, and disposal," 42 U. S. C. §6903(7)—just about every hazardous waste-related activity *except* generation. We think it follows from the carefully constructed text of §3001(i) that while a resource recovery facility's management activities are excluded from Subtitle C regulation, its generation of toxic ash is not.

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[1] The dissent is able to describe the provision as exempting the ash itself only by resorting to what might be called imaginative use of ellipsis: "even though the material being treated and disposed of contains hazardous components before, during, and after its treatment[,] that material 'shall not be deemed to be . . . hazardous.'" *Post,* at 346. In the full text, quoted above, the subject of the phrase "shall not be deemed . . . hazardous" is *not* the material, but the *resource recovery facility,* and the complete phrase, including (italicized) the ellipsis, reads "shall not be deemed to be *treating, storing, disposing of, or otherwise managing* hazardous *wastes.*" Deeming a facility not to be engaged in these activities with respect to hazardous wastes is of course quite different from deeming the output of that facility not to be hazardous.

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[2] "Treatment" means "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous." 42 U. S. C. §6903(34).

"Storage" means "the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." §6903(33).

"Disposal" means "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters." §6903(3).

Petitioners appeal to the legislative history of §3001(i), which includes, in the Senate Committee Report, the statement that "[a]ll waste management activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion." S. Rep. No. 98–284, p. 61 (1983) (emphasis added). But it is the statute, and not the Committee Report, which is the authoritative expression of the law, and the statute prominently *omits* reference to generation. As the Court of Appeals cogently put it: "Why should we, then, rely upon a single word in a committee report that did not result in legislation? Simply put, we shouldn't." 948 F. 2d, at 351.[3] Petitioners point out that the activity by which they "treat" municipal waste is the very same activity by which they "generate" MWC ash, to wit, incineration. But there is nothing extraordinary about an activity's being exempt for some purposes and nonexempt for others. The incineration here is exempt from TSDF regulation, but subject to regulation as hazardous waste generation. (As we have noted, see *supra*, at 331–332, the latter is much less onerous.)

Our interpretation is confirmed by comparing §3001(i) with another statutory exemption in RCRA. In the Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99–499, §124(b), 100 Stat. 1689, Congress amended 42 U. S. C. §6921 to provide that an "owner and operator of equipment used to recover methane from a landfill shall not be deemed to be managing, generating, transporting, treating, storing, or disposing of hazardous or liquid wastes within the meaning of" Subtitle C. This provision, in contrast to § 3001(i), provides a complete exemption by including the term "generating" in its list of covered activities. "[I]t is generally presumed that Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another," *Keene Corp.* v. *United States,* 508 U. S. 200, 208 (1993) (internal quotation marks omitted). We agree with respondents that this provision "shows that Congress knew how to draft a waste stream exemption in RCRA when it wanted to." Brief for Respondents 18.

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[3] Nothing in the dissent's somewhat lengthier discourse on §3001(i)'s legislative history, see *post*, at 343–345, convinces us that the statute's omission of the term "generation" is a scrivener's error.

Petitioners contend that our interpretation of § 3001(i) turns the provision into an "empty gesture," Brief for Petitioners 23, since even under the pre-existing regime an incinerator burning household waste and nonhazardous industrial waste was exempt from the Subtitle C TSDF provisions. If § 3001(i) did not extend the waste-stream exemption to the product of such a combined household/nonhazardous-industrial treatment facility, petitioners argue, it did nothing at all. But it is not nothing to codify a household waste exemption that had previously been subject to agency revision; nor is it nothing (though petitioners may value it as less than nothing) to *restrict* the exemption that the agency previously provided—which is what the provision here achieved, by withholding all waste-stream exemption for waste processed by resource recovery facilities, even for the waste stream passing through an exclusively household waste facility.[4]

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[4] We express no opinion as to the validity of EPA's household waste regulation as applied to resource recovery facilities *before* the effective date of § 3001(i). Furthermore, since the statute in question addresses only resource recovery facilities, not household waste in general, we are unable to reach any conclusions concerning the validity of EPA's regulatory scheme for household wastes *not* processed by resource recovery facilities.

We also do not agree with petitioners' contention that our construction renders § 3001(i) ineffective for its intended purpose of promoting household/nonhazardous-industrial resource recovery facilities, see 42 U. S. C. §§ 6902(a)(1), (10), (11), by subjecting them "to the potentially enormous expense of managing ash residue as a hazardous waste." Brief for Petitioners 20. It is simply not true that a facility which is (as our interpretation says these facilities are) a hazardous waste "generator" is also deemed to be "managing" hazardous waste under RCRA. Section 3001(i) clearly exempts these facilities from Subtitle C TSDF regulations, thus enabling them to avoid the "full brunt of EPA's enforcement efforts under RCRA." Practice Guide § 29.05[1].

* * *

RCRA's twin goals of encouraging resource recovery and protecting against contamination sometimes conflict. It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text. Here that requires us to reject the Solicitor General's plea for deference to the EPA's interpretation, cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844 (1984), which goes beyond the scope of whatever ambiguity § 3001(i) contains. See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U. S. 86, 109 (1993). Section 3001(i) simply cannot be read to contain the cost-saving waste-stream exemption petitioners seek.[5]

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit is

Affirmed.

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[5] In view of our construction of § 3001(i), we need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication.

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

The statutory provision in question is a 1984 amendment entitled "Clarification of Household Waste Exclusion."[1] To understand that clarification, we must first examine the "waste exclusion" that the amendment clarified and, more particularly, the ambiguity that needed clarification. I therefore begin with a discussion of the relevant pre-1984 law. I then examine the text of the statute as amended and explain why the apparent tension between the broad definition of the term "hazardous waste generation" in the 1976 Act and the more specific exclusion for the activity of incinerating household wastes (and mixtures of household and other nonhazardous wastes) in the 1984 amendment should be resolved by giving effect to the later enactment.

I

When Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA), it delegated to the Environmental Protection Agency (EPA) vast regulatory authority over the mountains of garbage that our society generates. The statute directed the EPA to classify waste as hazardous or nonhazardous and to establish regulatory controls over the disposition of the two categories of waste pursuant to Subtitles C and D of RCRA. 42 U. S. C. §6921(a); see *ante*, at 331–332. To that end, the EPA in 1980 promulgated detailed regulations establishing a federal hazardous waste management system pursuant to Subtitle C.

Generally, though not always, the EPA regulations assume that waste is properly characterized as hazardous or nonhazardous when it first becomes waste. Based on that characterization, the waste is regulated under either Subtitle C or D. Household waste is regarded as nonhazardous when it is first discarded and, as long as it is not mixed with hazardous waste, it retains that characterization during and after its treatment and disposal. Even though it contains some materials that would be classified as hazardous in other contexts, and even though its treatment may produce a residue that contains a higher concentration of hazardous matter than when the garbage was originally discarded, such waste is regulated as nonhazardous waste under Subtitle D. See *ante*, at 332–333. Thus, an incinerator that burns nothing but household waste might "generate" tons of hazardous residue, but as a statutory matter it still is deemed to be processing nonhazardous waste and is regulated as a Subtitle D, rather than Subtitle C, facility.

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[1] Section 223 of the Hazardous and Solid Waste Amendments of 1984 amended §3001 of the Resource Conservation and Recovery Act of 1976. See 98 Stat. 3252; 42 U. S. C. §6921(i). The text of the provision is quoted *ante*, at 334.

Section 261.4(b)(1) of the EPA's 1980 regulations first established the household waste exclusion. See 45 Fed. Reg. 33120 (1980). The relevant text of that regulation simply provided that solid wastes derived from households (including single and multiple residences, hotels, and motels) were "not hazardous wastes."[2] The regulation itself said nothing about the status of the residue that remains after the incineration of such household waste. An accompanying comment, however, unambiguously explained that "residues remaining after treatment (*e. g.* incineration, thermal treatment) are not subject to regulation as hazardous waste." *Id.*, at 33099. Thus, the administrative history of the 1980 regulation, rather than its text, revealed why a municipal incinerator burning household waste was not treated as a generator of hazardous waste.

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[2] The full text of 40 CFR §261.4(b)(1) (1993) reads as follows:

"(b) *Solid Wastes which are not hazardous wastes.* The following solid wastes are not hazardous wastes:

"(1) Household waste, including household waste that has been collected, transported, stored, treated, disposed, recovered (*e. g.*, refuse-derived fuel) or reused. 'Household waste' means any waste material (including garbage, trash and sanitary wastes in septic tanks) derived from households (including single and multiple residences, hotels and motels)."

The EPA's explanatory comment contained an important warning: If household waste was "mixed with other hazardous wastes," the entire mixture would be deemed hazardous.[3] Yet neither the comment nor the regulation itself identified the consequences of mixing household waste with other wastes that are entirely *nonhazardous.*[4] Presumably such a mixture would contain a lower percentage of hazardous material than pure household waste, and therefore should also be classified as nonhazardous—assumptions that are not inconsistent with the EPA's warning that mixing household waste "with other *hazardous* wastes" would terminate the household waste exemption. The EPA's failure to comment expressly on the significance of adding 100 percent nonhazardous commercial or industrial waste nevertheless warranted further clarification.

Congress enacted that clarification in 1984. Elaborating upon the EPA's warning in 1980, the text of the 1984 amendment—§ 3001(i) of RCRA, 42 U. S. C. § 6921(i)—made clear that a facility treating a mixture of household waste and "solid waste from commercial or industrial sources that does not contain hazardous waste," § 6921(i)(1)(A)(ii), shall not be deemed to be treating hazardous waste. In other words, the addition of *non*hazardous waste derived from other sources does not extinguish the household waste exclusion.

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[3] "When household waste is mixed with other hazardous wastes, however, the entire mixture will be deemed hazardous in accord with § 261.3(a)(2)(ii) of these regulations except when they are mixed with hazardous wastes produced by small quantity generators (see § 261.5). While household waste may not be hazardous per se, it is like any other solid waste. Thus a mixture of household and hazardous (except those just noted) wastes is also regulated as a hazardous waste under these regulations." 45 Fed. Reg. 33099 (1980).

[4] In this regard, because the regulations left unexplained the ramifications of mixing household waste with nonhousehold waste that is not hazardous, the Court errs by asserting unqualifiedly that the Chicago incinerator "would have been considered a Subtitle C generator under the 1980 regulations." *Ante,* at 334.

The parallel between the 1980 regulation and the 1984 statutory amendment is striking. In 1980 the EPA referred to the exclusion of household waste "in all phases of its management."[5] Similarly, the 1984 statute lists *all phases* of the incinerator's management when it states that a facility recovering energy from the mass burning of a mixture of household waste and other solid waste that does not contain hazardous waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes." See 42 U. S. C. § 6921(i). Even though that text only refers to the exemption of the facility that burns the waste, the title of the section significantly characterizes it as a *waste* exclusion. Moreover, the title's description of the amendment as a "clarification" identifies an intent to codify its counterpart in the 1980 regulation.

The Report of the Senate Committee that recommended the enactment of § 3001(i) demonstrates that the sponsors of the legislation understood it to have the same meaning as the 1980 EPA regulation that it "clarified." That Report, which is worth setting out in some detail, first notes that the reported bill adds the amendment to § 3001 "to clarify the coverage of the household waste exclusion with respect to resource recovery facilities recovering energy through the mass burning of municipal solid waste." S. Rep. No. 98–284, p. 61 (1983). The EPA had promulgated the exclusion "in its hazardous waste management regulations established to exclude waste streams generated by consumers at the household level and by sources whose wastes are sufficiently similar in both quantity and quality to those of households." *Ibid.* The Report explains that resource recovery facilities frequently take in household wastes that are mixed with other nonhazardous waste streams from a variety of commercial and industrial sources, and emphasizes the importance of encouraging commercially viable resource recovery facilities. *Ibid.* To that end, "[n]ew section [3001(i)] clarifies the original intent to include within the household waste exclusion activities of a resource recovery facility which recovers energy from the mass burning of household waste and non-hazardous waste from other sources." *Ibid.* The Report further explains:

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[5] "Since household waste is excluded in all phases of its management, residues remaining after treatment (*e. g.* incineration, thermal treatment) are not subject to regulation as hazardous waste." 45 Fed. Reg. 33099 (1980).

> "All waste management activities of such a facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) of [the amendment] are met. First, such facilities must receive and burn only household waste and solid waste from other sources which does not contain hazardous waste identified or listed under section 3001.
>
> "Second, such facilities cannot accept hazardous wastes identified or listed under section 3001 from commercial or industrial sources, and must establish contractual requirements or other notification or inspection procedures to assure that such wastes are not received or burned. This provision requires precautionary measures or procedures which can be shown to be effective safeguards against the unintended acceptance of hazardous waste. If such measures are in place, a resource recovery facility whose activities would normally be covered by the household waste exclusion should not be penalized for the occasional, inadvertent receipt and burning of hazardous material from such commercial or industrial sources. Facilities must monitor the waste they receive and, if necessary, revise the precautionary

> measures they establish to assure against the receipt of such hazardous waste." *Ibid.*

These comments referred to the Senate bill that became law after a majority of the Senate followed the Committee's recommendation "that the bill (as amended) do pass." *Id.*, at 1.[6] Given this commentary, it is quite unrealistic to assume that the omission of the word "generating" from the particularized description of management activities in the statute was intended to render the statutory description any less inclusive than either the 1980 regulation or the Committee Report. It is even more unrealistic to assume that legislators voting on the 1984 amendment would have detected any difference between the statutory text and the Committee's summary just because the term "generating" does not appear in the 1984 amendment. A commonsense reading of the statutory text in the light of the Committee Report and against the background of the 1980 regulation reveals an obvious purpose to *preserve*, not to change, the existing rule.[7]

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[6] The Conference Committee adopted the Senate amendment verbatim. Its Report stated: "The Senate amendment clarifies that an energy recovery facility is exempt from hazardous waste requirements if it burns only residential and non-hazardous commercial wastes and establishes procedures to assure hazardous wastes will not be burned at the facility." H. R. Conf. Rep. No. 98–1133, p. 106 (1984).

[7] The majority's refusal to attach significance to "'a single word in a committee report,'" *ante*, at 337, reveals either a misunderstanding of, or a lack of respect for, the function of legislative committees. The purpose of a committee report is to provide the Members of Congress who have not taken part in the committee's deliberations with a summary of the provisions of the bill and the reasons for the committee's recommendation that the bill should become law. The report obviously does not have the force of law. Yet when the text of a bill is not changed after it leaves the committee, the Members are entitled to assume that the report fairly summarizes the proposed legislation. What makes this Report significant is not the single word "generation," but the unmistakable intent to maintain an existing rule of law. The omission of the single word "generating" from the statute has no more significance than the omission of the same word from the text of the 1980 regulation.

II

The relevant statutory text is not as unambiguous as the Court asserts. There is substantial tension between the broad definition of the term "hazardous waste generation" in § 1004(6) of RCRA and the household waste exclusion codified by the 1984 amendment: Both provisions can be read to describe the same activity. The former "means the act or process of producing hazardous waste." 90 Stat. 2799; 42 U. S. C. § 6903(6). Read literally, that definition is broad enough to encompass the burning of pure household waste that produces some hazardous residue. The only statutory escape from that conclusion is the 1984 amendment that provides an exemption for the activity of burning household waste. Yet that exemption does not distinguish between pure household waste, on the one hand, and a mixture of household and other nonhazardous wastes, on the other. It either exempts both the pure stream and the mixture, or it exempts neither.

Indeed, commercial and industrial waste is by definition nonhazardous: In order for it to fall within the exclusion created by the 1984 amendment, it must not contain hazardous components. As a consequence, the only aspect of this waste stream that would ordinarily be regulated by Subtitle C of RCRA is the ash residue. EPA could reasonably conclude, therefore, that to give any content to the statute with respect to this component of the waste stream, the incinerator ash must be exempted from Subtitle C regulation.

The exemption states that a facility burning solid waste "shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous wastes for the purposes of regulation under this subchapter" if two conditions are satisfied. See *ante,* at 334. As long as the two conditions are met—even though the material being treated and disposed of contains hazardous components before, during, and after its treatment—that material "shall not be deemed to be . . . hazardous." By characterizing both the input and the output as not hazardous, the 1984 amendment excludes the activity from the definition of hazardous waste generation that would otherwise apply. For it is obvious that the same activity cannot both subject a facility to regulation because its residue is hazardous and exempt the facility from regulation because the statute deems the same residue to be nonhazardous.[8]

Thus, if we are to be guided only by the literal meaning of the statutory text, we must either give effect to the broad definition of hazardous waste generation and subject all municipal incinerators that generate hazardous ash to Subtitle C regulation (including those that burn pure household waste) or give effect to the exclusion that applies equally to pure household waste and mixtures that include other nonhazardous wastes. For several reasons the latter is the proper choice. It effectuates the narrower and more recently enacted provision rather than the earlier more general definition. It respects the title of the 1984 amendment by treating what follows as a "clarification" rather than a repeal or a modification. It avoids the Court's rather surprising (and uninvited) decision to invalidate the household waste exclusion that the EPA adopted in 1980,[9] on which municipalities throughout the Nation have reasonably relied for over a decade.[10] It explains why the legislative history fails to mention an intent to impose significant new burdens on the operation of municipal incinerators. Finally, it is the construction that the EPA has adopted and that reasonable jurists have accepted.[11]

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[8] The Court characterizes my reading of the text as "imaginative use of ellipsis," *ante*, at 335, n. 1, because the subject of the predicate "shall not be deemed to be . . . hazardous" is the recovery facility rather than the residue that is disposed of after the waste is burned. That is true, but the reason the facility is exempted is because it is not "deemed to be . . . disposing of . . . hazardous wastes." Thus it is the statutorily deemed nonhazardous character of the object of the sentence—wastes—that effectively exempts from Subtitle C regulation the activity and the facility engaged in that activity. If, as the statute provides, a facility is not deemed to be disposing of hazardous wastes when it disposes of the output of the facility, it must be true that the output is deemed nonhazardous.

[9] Although the first nine pages of the Court's opinion give the reader the impression that the 1980 regulatory exclusion for pure household waste was valid, the Court ultimately acknowledges that its construction of the statute has the effect of "withholding all waste-stream exemption for waste processed by resource recovery facilities, even for the waste

The majority's decision today may represent sound policy. Requiring cities to spend the necessary funds to dispose of their incinerator residues in accordance with the strict requirements of Subtitle C will provide additional protections to the environment. It is also true, however, that the conservation of scarce landfill space and the encouragement of the recovery of energy and valuable materials in municipal wastes were major concerns motivating RCRA's enactment. Whether those purposes will be disserved by regulating municipal incinerators under Subtitle C and, if so, whether environmental benefits may nevertheless justify the costs of such additional regulation are questions of policy that we are not competent to resolve. Those questions are precisely the kind that Congress has directed the EPA to answer. The

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stream passing through an exclusively household waste facility." *Ante,* at 338. Of course, it is not the 1984 amendment that casts doubt on the validity of the regulation, see *ante,* at 338, n. 4, but the Court's rigid reading of § 1004(6)'s definition of the term "hazardous waste generation" that has achieved that result. Since that definition has been in RCRA since 1976, the Court utterly fails to explain how the 1984 amendment made any change in the law.

[10] At oral argument Government counsel advised us that the Chicago incinerator is one of about 150 comparable facilities in the country and that the EPA has never contended that the acceptance of nonhazardous commercial waste subjected any of them to regulation under Subtitle C. Tr. of Oral Arg. 25.

[11] See specially Judge Haight's comprehensive opinion in *Environmental Defense Fund, Inc.* v. *Wheelabrator Technologies, Inc.,* 725 F. Supp. 758 (SDNY 1989), aff'd, 931 F. 2d 211 (CA2 1991). That decision is cited with approval by Circuit Judge Ripple, 985 F. 2d 303, 305 (CA7 1993) (dissenting opinion); *Environmental Defense Fund, Inc.* v. *Chicago,* 948 F. 2d 345, 352 (CA7 1991) (dissenting opinion), in this litigation.

EPA's position, first adopted unambiguously in 1980 and still maintained today,[12] was and remains a correct and permissible interpretation of the EPA's broad congressional mandate.

Accordingly, I respectfully dissent.

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[12] Although there has been some ambivalence in the EPA's views since 1985, see 725 F. Supp., at 766–768, there is no ambiguity or equivocation in either its original or its present interpretation of RCRA.

UNITED STATES *v.* ALVAREZ-SANCHEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–1812. Argued March 1, 1994—Decided May 2, 1994

Nearly three days after local law enforcement officers arrested respondent on state narcotics charges, and while he was still in the custody of those officers, respondent confessed to United States Secret Service agents that he knew that Federal Reserve Notes the local officers had discovered while searching his home were counterfeit. The agents arrested him for possessing counterfeit currency and presented him on a federal complaint the following day. The Federal District Court refused to suppress the confession, rejecting, *inter alia*, respondent's argument that the delay between his arrest on state charges and his presentment on the federal charge rendered the confession inadmissible under 18 U. S. C. § 3501(c), which provides that a confession made while a defendant is "under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before [a judicial officer] empowered to commit persons charged with offenses against the laws of the United States" if the confession was made voluntarily and "within six hours" following the arrest or other detention. Respondent was convicted. In vacating the conviction, the Court of Appeals reasoned that, by negative implication, § 3501(c) permits suppression in cases where a confession is made outside the subsection's 6-hour post-arrest safe harbor period. The court concluded that § 3501(c) applied to respondent's statement because respondent was in custody and had not been presented to a magistrate at the time he confessed, and held that the confession should have been suppressed.

Held: Section 3501(c) does not apply to statements made by a person who is being held solely on state charges. Pp. 355–360.

(a) The subsection's text clearly indicates that its terms were never triggered in this case. Respondent errs in suggesting that, because the statute refers to a person in the custody of "any" law enforcement officer or agency, the 6-hour time period begins to run whenever a person is arrested by local, state, or federal officers. The subsection can apply only when there is some "delay" in presenting a person to a federal judicial officer. Because the term delay presumes an obligation to act, there can be no "delay" in bringing a person before a federal judicial officer until there is some obligation to do so in the first place. Such a duty does not arise until the person is arrested or detained for a federal crime. Although a person arrested on a federal charge by any officer—local, state, or federal—is under "arrest or other detention" for the purposes of § 3501(c) and its safe harbor period, one arrested on state charges is not. This is true even if the arresting officers believe or have cause to believe that federal law also has been violated, because such a belief does not alter the underlying basis for the arrest and subsequent custody. Pp. 355–358.

(b) Respondent was under arrest on state charges when he made his inculpatory statement to the Secret Service agents. Section 3501(c)'s terms thus did not come into play until he was arrested on a federal charge—after he made the statement. That he was never arraigned or prosecuted on the state charges does not alter this conclusion. Finally, there is no need to consider the situation that would arise if state or local authorities and federal officers act in collusion to obtain a confession in violation of a defendant's right to a prompt federal presentment, because in this case there was no such collusive arrangement, only routine cooperation between law enforcement agencies. Pp. 359–360.

975 F. 2d 1396, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. GINSBURG, J., filed a concurring opinion, in which BLACKMUN, J., joined, *post*, p. 361. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 361.

Miguel A. Estrada argued the cause for the United States. With him on the briefs were *Solicitor General Days, Assistant Attorney General Harris,* and *Deputy Solicitor General Bryson.*

Carlton F. Gunn argued the cause and filed a brief for respondent.

JUSTICE THOMAS delivered the opinion of the Court.

This case concerns the scope of 18 U. S. C. § 3501, the statute governing the admissibility of confessions in federal prosecutions. Respondent contends that § 3501(c), which provides that a custodial confession made by a person within six hours following his arrest "shall not be inadmissible solely because of delay in bringing such person" before a federal magistrate, rendered inadmissible the custodial statement he made more than six hours after his arrest on state criminal charges. We conclude, however, that § 3501(c) does not apply to statements made by a person who is being held solely on state charges. Accordingly, we reverse the judgment of the Court of Appeals.

I

On Friday, August 5, 1988, officers of the Los Angeles Sheriff's Department obtained a warrant to search respondent's residence for heroin and other evidence of narcotics distribution. While executing the warrant later that day, the officers discovered not only narcotics, but $2,260 in counterfeit Federal Reserve Notes. Respondent was arrested and booked on state felony narcotics charges at approximately 5:40 p.m. He spent the weekend in custody.

On Monday morning, August 8, the Sheriff's Department informed the United States Secret Service of the counterfeit currency found in respondent's residence. Two Secret Service agents arrived at the Sheriff's Department shortly before midday to take possession of the currency and to interview respondent. Using a deputy sheriff as an interpreter, the agents informed respondent of his rights under *Miranda* v. *Arizona,* 384 U. S. 436 (1966). After waiving these rights, respondent admitted that he had known that the currency was counterfeit. The agents arrested respondent shortly thereafter, took him to the Secret Service field office for booking, and prepared a criminal complaint. Due to congestion in the Federal Magistrate's docket, respondent was not presented on the federal complaint until the following day.[1]

Respondent was indicted for unlawful possession of counterfeit currency in violation of 18 U. S. C. § 472. Prior to trial, he moved to suppress the statement he had made during his interview with the Secret Service agents. He argued that his confession was made without a voluntary and knowing waiver of his *Miranda* rights, and that the delay between his arrest on state charges and his presentment on the federal charge rendered his confession inadmissible under 18 U. S. C. § 3501(c).[2] The District Court rejected

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[1] For reasons that are not apparent from the record, respondent was never arraigned or prosecuted by the State of California on the state drug charges.

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[2] Title 18 U. S. C. § 3501 provides:

"(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence . . . .

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment . . . .

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which both contentions and denied the motion. Respondent subsequently was convicted after a jury trial at which the statement was admitted into evidence.

The United States Court of Appeals for the Ninth Circuit vacated the conviction. 975 F. 2d 1396 (1992). The court first outlined the exclusionary rule developed by this Court in a line of cases including *McNabb* v. *United States,* 318 U. S. 332 (1943), and *Mallory* v. *United States,* 354 U. S. 449 (1957). The so-called *McNabb-Mallory* rule, adopted by this Court "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," *McNabb, supra,* at 341, generally rendered inadmissible confessions made during periods of detention that violated the prompt presentment requirement of Rule 5(a) of the Federal Rules of Criminal Procedure. See *Mallory, supra,* at 453. Rule 5(a) provides that a person arrested for a federal offense shall be taken "without unnecessary delay" before the nearest federal magistrate, or before a state or local judicial officer authorized to set bail for federal offenses under 18 U. S. C. § 3041, for a first appearance, or presentment.

The Ninth Circuit went on to discuss the interrelated provisions of 18 U. S. C. § 3501 and the decisions of the Courts of Appeals that have sought to discern the extent to which this statute curtailed the *McNabb-Mallory* rule. Section 3501(a), the court observed, states that a confession "shall be admitted in evidence" if voluntarily made, and § 3501(b) lists several nonexclusive factors that the trial judge should consider when making the voluntariness determination, including "the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment." Section 3501(c) provides

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the person who made or gave such confession was not under arrest or other detention.

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

that a confession made by a person within six hours following his arrest or other detention "shall not be inadmissible" solely because of delay in presenting the person to a federal magistrate. The Ninth Circuit construed § 3501(c) as precluding suppression under *McNabb-Mallory* of any confession made during this "safe harbor" period following arrest. 975 F. 2d, at 1399. The court then reasoned that, by negative implication, § 3501(c) must in some circumstances allow suppression of a confession made more than six hours after arrest solely on the basis of pre-presentment delay, "regardless of the voluntariness of the confession." *Id.*, at 1401. The court thus concluded that the *McNabb-Mallory* rule, in either a pure or slightly modified form, applies to confessions made after the expiration of the safe harbor period.

Turning to the facts of the case before it, the court determined that § 3501(c) applied to respondent's statement because respondent was in custody and had not been presented to a magistrate at the time of the interview. The court concluded that the statement fell outside the subsection's safe harbor because it was not made until Monday afternoon, nearly three days after respondent's arrest on state charges. 975 F. 2d, at 1405, and n. 8 (citing *United States* v. *Fouche*, 776 F. 2d 1398, 1406 (CA9 1985)). Because the statement was not made within the § 3501(c) safe harbor period, the court applied both its pure and modified versions of the *McNabb-Mallory* rule and held that, under either approach, the confession should have been suppressed. 975 F. 2d, at 1405–1406.

We granted the Government's petition for a writ of certiorari in order to consider the Ninth Circuit's interpretation of § 3501. 510 U. S. 912 (1993).

II

The parties argue at some length over the proper interpretation of subsections (a) and (c) of 18 U. S. C. § 3501, and, in particular, over the question whether § 3501(c) requires suppression of a confession that is made by an arrestee prior to presentment and more than six hours after arrest, regardless of whether the confession was voluntarily made. The Government contends that through § 3501, Congress repudiated the *McNabb-Mallory* rule in its entirety. Under this theory, § 3501(c) creates a safe harbor that prohibits suppression on grounds of pre-presentment delay if a confession is made within six hours following arrest, but says nothing about the admissibility of a confession given beyond that 6-hour period. The admissibility of such a confession, the Government argues, is controlled by § 3501(a), which provides that voluntary confessions "shall be admitted in evidence."

Largely agreeing with the Ninth Circuit, respondent contends that § 3501(c) codified a limited form of the *McNabb-Mallory* rule—one that requires the suppression of a confession made before presentment but after the expiration of the safe harbor period. A contrary interpretation of § 3501(c), respondent argues, would render that subsection meaningless in the face of § 3501(a).

As the parties recognize, however, we need not address subtle questions of statutory construction concerning the safe harbor set out in § 3501(c), or resolve any tension between the provisions of that subsection and those of § 3501(a), if we determine that the terms of § 3501(c) were never triggered in this case. We turn, then, to that threshold inquiry.

When interpreting a statute, we look first and foremost to its text. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992). Section 3501(c) provides that in any federal criminal prosecution,

> "a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a

> magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if . . . such confession was made or given by such person within six hours immediately following his arrest or other detention."

Respondent contends that he was under "arrest or other detention" for purposes of § 3501(c) during the interview at the Sheriff's Department, and that his statement to the Secret Service agents constituted a confession governed by this subsection. In respondent's view, it is irrelevant that he was in the custody of the local authorities, rather than that of the federal agents, when he made the statement. Because the statute applies to persons in the custody of "*any*" law enforcement officer or law enforcement agency, respondent suggests that the § 3501(c) 6-hour time period begins to run whenever a person is arrested by local, state, *or* federal officers.

We believe respondent errs in placing dispositive weight on the broad statutory reference to "any" law enforcement officer or agency without considering the rest of the statute. Section 3501(c) provides that, if certain conditions are met, a confession made by a person under "arrest or other detention" shall not be inadmissible in a subsequent federal prosecution "solely because of *delay* in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia." 18 U. S. C. § 3501(c) (emphasis added). Clearly, the terms of the subsection can apply only when there is some "delay" in presentment. Because "delay" is not defined in the statute, we must construe the term "in accordance with its ordinary or natural meaning." *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994). To delay is "[t]o postpone until a later time" or to "put off an action"; a delay is a "postponement." American Heritage Dictionary

493 (3d ed. 1992). The term presumes an obligation to act. Thus, there can be no "delay" in bringing a person before a federal magistrate until, at a minimum, there is some obligation to bring the person before such a judicial officer in the first place. Plainly, a duty to present a person to a federal magistrate does not arise until the person has been arrested for a *federal* offense. See Fed. Rule Crim. Proc. 5(a) (requiring initial appearance before a federal magistrate).[3] Until a person is arrested or detained for a federal crime, there is no duty, obligation, or reason to bring him before a judicial officer "empowered to commit persons charged with offenses against the laws of the United States," and therefore, no "delay" under § 3501(c) can occur.

In short, it is evident "from the context in which [the phrase] is used," *Deal* v. *United States*, 508 U. S. 129, 132 (1993), that the "arrest or other detention" of which the subsection speaks must be an "arrest or other detention" for a violation of *federal* law. If a person is arrested and held on a federal charge by "any" law enforcement officer—federal, state, or local—that person is under "arrest or other detention" for purposes of § 3501(c) and its 6-hour safe harbor period. If, instead, the person is arrested and held on state charges, § 3501(c) does not apply, and the safe harbor is not implicated. This is true even if the arresting officers (who, when the arrest is for a violation of state law, almost certainly will be agents of the State or one of its subdivisions) believe or have cause to believe that the person also may have violated federal law. Such a belief, which may not be uncommon given that many activities are criminalized under both state and federal law, does not alter the underlying basis for the arrest and subsequent custody. As long as a person is arrested and held only on state charges by state or local authorities, the provisions of § 3501(c) are not triggered.

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[3] As we observed in *Mallory* v. *United States*, 354 U. S. 449 (1957), Rule 5(a) is part of "[t]he scheme for initiating a *federal* prosecution." *Id.*, at 454 (emphasis added).

In this case, respondent was under arrest on *state* narcotics charges at the time he made his inculpatory statement to the Secret Service agents. The terms of § 3501(c) thus did not come into play until respondent was arrested by the agents on a federal charge—*after* he made the statement. Because respondent's statement was made voluntarily, as the District Court found, see App. to Pet. for Cert. 45a, nothing in § 3501 authorized its suppression. See 18 U. S. C. §§ 3501(a), (d). The State's failure to arraign or prosecute respondent does not alter this conclusion. Although Congress could have provided that the exercise of prosecutorial discretion by the State in this scenario retroactively transforms time spent in the custody of state or local officers into time spent under "arrest or other detention" for purposes of § 3501(c), it did not do so in the statute as written. Cf. *Germain*, 503 U. S., at 253–254.

Although we think proper application of § 3501(c) will be as straightforward in most cases as it is here, the parties identify one presumably rare scenario that might present some potential for confusion; namely, the situation that would arise if state or local authorities, acting in collusion with federal officers, were to arrest and detain someone in order to allow the federal agents to interrogate him in violation of his right to a prompt federal presentment. Long before the enactment of § 3501, we held that a confession obtained during such a period of detention must be suppressed if the defendant could demonstrate the existence of improper collaboration between federal and state or local officers. See *Anderson* v. *United States*, 318 U. S. 350 (1943).[4] In this case, however, we need not address § 3501's effect, if any, on the rule announced in *Anderson.* The District Court concluded that there was "no evidence" that a "collusive arrangement between state and federal agents . . . caused [respondent's] confession to be made," App. to Pet. for Cert. 50a, and we see no reason to disturb that factual finding. It is true that the Sheriff's Department informed the Secret Service agents that counterfeit currency had been found in respondent's possession, but such routine cooperation between local and federal authorities is, by itself, wholly unobjectionable: "Only by such an interchange of information can society be adequately protected against crime." *United States* v. *Coppola,* 281 F. 2d 340, 344 (CA2 1960) (en banc), aff'd, 365 U. S. 762 (1961). Cf. *Bartkus* v. *Illinois,* 359 U. S. 121, 123 (1959).[5]

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[4] In *Anderson*, a local sheriff, acting without authority under state law, arrested several men suspected of dynamiting federally owned power lines during the course of a labor dispute and allowed them to be interrogated for several days by agents of the Federal Bureau of Investigation. Only after the suspects made confessions were they arrested by the federal agents and arraigned before a United States Commissioner. We held the confessions to be inadmissible as the "improperly" secured product of an impermissible "working arrangement" between state and federal officers. 318 U. S., at 356.

III

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

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[5] Respondent urges that the judgment below should be affirmed on an alternative ground. Although he was initially arrested on state charges on a Friday afternoon and held in local custody until Monday afternoon, respondent was not brought before a magistrate during this period. In *County of Riverside* v. *McLaughlin,* 500 U. S. 44, 57 (1991), we held that the Fourth Amendment generally requires a judicial determination of probable cause within 48 hours of a warrantless arrest. Relying on *McLaughlin* and *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), respondent now asserts that his confession was obtained during an ongoing violation of his Fourth Amendment right to a prompt determination of probable cause. Respondent, however, did not raise a Fourth Amendment claim in the District Court or the Court of Appeals; he argued for suppression based only on the Fifth Amendment and § 3501. Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's Fourth Amendment argument. See *Granfinanciera, S. A.* v. *Nordberg,* 492 U. S. 33, 38–39 (1989); *Heckler* v. *Campbell,* 461 U. S. 458, 468–469, n. 12 (1983).

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN joins, concurring.

When Alvarez-Sanchez was arrested by the Los Angeles Sheriff's Department, 18 U. S. C. § 3501(c) was not triggered. As the Court explains, an arrest by state or local law enforcement authorities on state criminal charges is not an "arrest or other detention" within the meaning of § 3501(c), and there is no evidence in this case of any "improper collaboration," *ante*, at 359, or "working arrangement," *Anderson* v. *United States*, 318 U. S. 350, 356 (1943), between local and federal authorities. See *ante*, at 357–360, and n. 4. I write separately only to emphasize that we do *not* decide today a question on which the Courts of Appeals remain divided: the effect of § 3501(c) on confessions obtained more than six hours after an arrest on federal charges. See *ante*, at 356, 359–360.*

JUSTICE STEVENS, concurring in the judgment.

The Court holds that § 3501(c) "does not apply to statements made by a person who is being held solely on state charges." *Ante*, at 352. While I agree with the Court's answer to the narrow question the petition for certiorari presents,[1] I write separately to emphasize the importance of the factual premise underlying that answer.

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*Compare, *e. g.*, 975 F. 2d 1396, 1402–1403 (1992) (decision below), and *United States* v. *Perez*, 733 F. 2d 1026, 1031 (CA2 1984) ("[§]3501 leaves the *McNabb-Mallory* rule intact with regard to confessions obtained after a six hour delay not found to be reasonable"); *United States* v. *Robinson*, 439 F. 2d 553, 563–564 (CADC 1970) (same), with *United States* v. *Christopher*, 956 F. 2d 536, 538–539 (CA6 1991) (under § 3501, unnecessary delay of more than six hours, "standing alone, is not sufficient to justify the suppression of an otherwise voluntary confession"), cert. denied, 505 U. S. 1207 (1992); *United States* v. *Beltran*, 761 F. 2d 1, 8 (CA1 1985) (same).

[1] The question presented is "Whether a confession given to federal authorities while a suspect is in state custody awaiting arraignment on state charges must be suppressed as a result of delay between the suspect's original arrest by state authorities and his eventual presentment on the federal crime to which he confessed." Pet. for Cert. I.

As the case comes to us, it is undisputed that respondent confessed while he was being held on state charges alone. 975 F. 2d 1396, 1398 (CA9 1992). Accepting that, the Court of Appeals held that the confession nevertheless must be suppressed because it read the phrase "detention in the custody of any law-enforcement officer or law-enforcement agency" in 18 U. S. C. § 3501(c) to include custody solely on state charges. 975 F. 2d, at 1405. The Court of Appeals therefore had no occasion to consider whether the state police officers' awareness of respondent's probable involvement in two federal crimes[2] might indicate that the state charges were not the sole basis for his detention.

In its petition for certiorari the Government correctly advised us that "[r]eversal of the Ninth Circuit's erroneous conclusion that the relevant arrest was effected by California authorities will obviate the need to consider" additional issues. Pet. for Cert. 13. Accordingly, what sort of cooperation between federal and local authorities would remove a case from the category in which the custody is decidedly on state charges alone is a question not before us, and the Court correctly declines to address the matter. Surely, however, cases in which cooperation between state and federal authorities requires compliance with the terms of § 3501(c) are not merely hypothetical examples of a "presumably rare scenario," *ante*, at 359. And I definitely would not assume that § 3501(c) will never "come into play" until a suspect is arrested on a federal charge. *Ibid.*

The Court also has no reason to comment on the District Court's finding that respondent's confession was not the product of collusion between state and federal agents.

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[2] Los Angeles police officers took respondent into custody on a Friday. 975 F. 2d 1396, 1397–1398 (CA9 1992). At the time of arrest, those officers discovered that respondent possessed two kinds of contraband—narcotics and counterfeit money, *id.*, at 1398—and they presumably realized that he was guilty of at least two federal offenses as well as the state-law violation for which he was arrested.

Ante, at 360. The Court of Appeals' construction of the statute made review of that finding unnecessary. Thus while the Court rightly declines to "disturb" the factual finding, *ibid.*, it should likewise stop short of suggesting that anyone on this Court has determined that the finding is either correct or incorrect.

For these reasons, I concur in the Court's judgment but do not join its opinion.

IN RE ANDERSON

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

No. 93–8312. Decided May 2, 1994

During the last three years alone, *pro se* petitioner Anderson has filed 22 separate petitions and motions, most for extraordinary writs. This Court denied all of them without recorded dissent. He was also denied leave to proceed *in forma pauperis,* pursuant to this Court's Rule 39.8, on the last three occasions that he has submitted petitions for extraordinary relief.

Held: Anderson is denied leave to proceed *in forma pauperis* in the instant case, and the Clerk is instructed not to accept any further petitions for extraordinary writs from him unless he pays the required docketing fee and submits his petitions in compliance with Rule 33. For the reasons discussed in *In re Demos,* 500 U. S. 16, *In re Sindram,* 498 U. S. 177, and *In re McDonald,* 489 U. S. 180, the Court feels compelled to enter this order, which will allow it to devote its limited resources to the claims of petitioners who have not abused the Court's process.

Motion denied.

PER CURIAM.

Pro se petitioner Grant Anderson seeks an extraordinary writ pursuant to 28 U. S. C. § 2241 and requests permission to proceed *in forma pauperis* under this Court's Rule 39. Pursuant to Rule 39.8, we deny petitioner leave to proceed *in forma pauperis.** Petitioner is allowed until May 23, 1994, within which to pay the docketing fee required by Rule 38 and to submit his petition in compliance with this Court's Rule 33. For the reasons explained below, we also direct the Clerk of the Court not to accept any further petitions for extraordinary writs from petitioner unless he pays the docketing fee required by Rule 38 and submits his petitions in compliance with Rule 33.

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*This Court's Rule 39.8 provides: "If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ, as the case may be, is frivolous or malicious, the Court may deny a motion for leave to proceed *in forma pauperis.*"

Petitioner is a prolific filer in this Court. In the last three years alone, he has filed 22 separate petitions and motions, including 3 petitions for certiorari, 6 motions for reconsideration, and 13 petitions for extraordinary writs. Thirteen of these petitions and motions have been filed this Term. We have denied all of the petitions and motions without recorded dissent. We have also denied petitioner leave to proceed *in forma pauperis,* pursuant to Rule 39.8, on the last three occasions that he has submitted petitions for extraordinary relief.

Like the majority of his previous submissions to this Court, the instant petition for habeas corpus relates to the denial of petitioner's various postconviction motions by the District of Columbia Court of Appeals. The current petition merely repeats arguments that we have considered previously and not found worthy of plenary review. Like the three petitions in which we denied petitioner leave to proceed *in forma pauperis,* moreover, the instant petition is patently frivolous.

The bulk of petitioner's submissions have been petitions for extraordinary writs, and we limit our sanction accordingly. We have imposed similar sanctions in three prior cases. See *In re Demos,* 500 U. S. 16 (1991); *In re Sindram,* 498 U. S. 177 (1991); *In re McDonald,* 489 U. S. 180 (1989). For the reasons discussed in these cases, we feel compelled to bar petitioner from filing any further requests for extraordinary relief. As we concluded in *Sindram:*

> "The goal of fairly dispensing justice . . . is compromised when the Court is forced to devote its limited resources to the processing of repetitious and frivolous requests. *Pro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations—filing fees and attorney's fees—that deter other litigants from filing frivolous petitions. The risks of abuse are particularly acute with respect to applications for ex-

> traordinary relief, since such petitions are not subject to any time limitations and, theoretically, could be filed at any time without limitation. In order to prevent frivolous petitions for extraordinary relief from unsettling the fair administration of justice, the Court has a duty to deny *in forma pauperis* status to those individuals who have abused the system." 498 U. S., at 179–180 (citation omitted).

So long as petitioner qualifies under this Court's Rule 39 and does not similarly abuse the privilege, he remains free to file *in forma pauperis* requests for relief other than an extraordinary writ. See *id.*, at 180. In the meantime, however, today's order "will allow this Court to devote its limited resources to the claims of petitioners who have not abused our process." *In re Sassower*, 510 U. S. 4, 6 (1993).

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

During my years of service on the Court, I have not detected any threat to the integrity of its processes, or its ability to administer justice fairly, caused by frivolous petitions, whether filed by paupers or by affluent litigants. Three years ago I expressed the opinion that the cost of administering sanctions such as that imposed on this petitioner would exceed any perceptible administrative benefit. *In re Amendment to Rule 39*, 500 U. S. 13, 15 (1991). Any minimal savings in time or photocopying costs, it seemed to me, did not justify the damage that occasional orders denying *in forma pauperis* status would cause to "the symbolic interest in preserving equal access to the Court for both the rich and the poor." *Ibid.* Three years' experience under this Court's Rule 39.8 leaves me convinced that the dissenters in the cases the Court cites had it right. See *In re Demos*, 500 U. S. 16, 17–19 (1991); *In re Sindram*, 498 U. S. 177, 180–183

(1991); *In re McDonald,* 489 U. S. 180, 185–188 (1989). See also *Day* v. *Day,* 510 U. S. 1, 3 (1993) (STEVENS, J., dissenting). Again I respectfully dissent.

BEECHAM *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93–445. Argued March 21, 1994—Decided May 16, 1994*

Petitioners Beecham and Jones were each convicted of violating 18 U. S. C. § 922(g), which makes it unlawful for a convicted felon to possess a firearm. Title 18 U. S. C. § 921(a)(20) qualifies the definition of "conviction": "What constitutes a conviction [is] determined in accordance with the law of the jurisdiction in which the proceedings were held," *ibid.* (choice-of-law clause), and "[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction . . . ," *ibid.* (exemption clause). The respective District Courts decided that Beecham's and Jones' prior federal convictions could not be counted because petitioners' civil rights had been restored under state law. The Court of Appeals reversed, holding that state restoration of civil rights could not undo the federal disability flowing from a federal conviction.

Held: Petitioners can take advantage of § 921(a)(20) only if their civil rights have been restored under federal law, the law of the jurisdiction where the earlier proceedings were held. The choice-of-law clause is logically read to apply to the exemption clause. The inquiry throughout the statutory scheme is whether the person has a qualifying conviction on his record. The choice-of-law clause defines the rule for determining what constitutes a conviction. Asking, under the exemption clause, whether a person's civil rights have been restored is just one step in determining whether something should "be considered a conviction," a determination that, by the terms of the choice-of-law clause, is governed by the law of the convicting jurisdiction. That the other three items listed in the exemption clause are either always or almost always done by the jurisdiction of conviction also counsels in favor of interpreting civil rights restoration as possessing the same attribute. This statutory structure rebuts the arguments used by other Circuits to support their conclusion that the two clauses should be read separately. Moreover, even if there is no federal law procedure for restoring civil rights to federal felons, nothing in § 921(a)(20) supports the assumption that

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*Together with *Jones* v. *United States,* also on certiorari to the same court (see this Court's Rule 12.2).

Congress intended all felons to have access to all the procedures specified in the exemption clause, especially because there are many States that do not restore civil rights, either. Because the statutory language is unambiguous, the rule of lenity is inapplicable. See *Chapman* v. *United States,* 500 U. S. 453, 463-464. Pp. 370–374.

993 F. 2d 1539 (first case) and 993 F. 2d 1131 (second case), affirmed.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Nathan Lewin argued the cause for petitioners. With him on the briefs were *Mathew S. Nosanchuk* and *R. Russell Stobbs.*

Edward C. DuMont argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris, Deputy Solicitor General Bryson,* and *John F. De Pue.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Today we construe three provisions of the federal firearms statutes:

> "It shall be unlawful for any person who has been convicted . . . [of] a crime punishable by imprisonment for a term exceeding one year . . . [to possess] any firearm . . . ." 18 U. S. C. § 922(g).
>
> "What constitutes a conviction . . . shall be determined in accordance with the law of the jurisdiction in which the proceedings were held." § 921(a)(20) (the choice-of-law clause).
>
> "Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction . . . ." *Ibid.* (the exemption clause).

The question before us is which jurisdiction's law is to be considered in determining whether a felon "has had civil rights restored" for a prior federal conviction.

I

Each of the petitioners was convicted of violating § 922(g). Beecham was convicted in Federal District Court in North Carolina, Jones in Federal District Court in West Virginia. Beecham's relevant prior conviction was a 1979 federal conviction in Tennessee, for violating 18 U. S. C. § 922(h). App. 11. Jones' prior convictions were two West Virginia state convictions, for breaking and entering and for forgery, and one 1971 federal conviction in Ohio for interstate transportation of a stolen automobile. *Id.*, at 19–20.

Jones had gotten his civil rights restored by West Virginia, so his two West Virginia state convictions were not considered. Beecham claimed his civil rights had been restored by Tennessee, the State in which he had been convicted of his federal offense. The question presented to the District Courts was whether these restorations of civil rights by *States* could remove the disabilities imposed as a result of Beecham's and Jones' *federal* convictions.

In both cases, the District Courts concluded the answer was "yes," though for different reasons: In Beecham's case the court looked to the law of the State in which the earlier federal crime was committed (Tennessee); in Jones' case the court looked to the law of the State in which Jones lived when he committed the § 922(g) offense (West Virginia). The Fourth Circuit reversed both rulings, reasoning that state restoration of civil rights could not undo the federal disability flowing from a federal conviction. See 993 F. 2d 1131 (1993) (Jones' case) and 993 F. 2d 1539 (1993) (judgt. order in Beecham's case). We granted certiorari to resolve the conflict this decision created with *United States* v. *Edwards*, 946 F. 2d 1347 (CA8 1991), and *United States* v. *Geyler*, 932 F. 2d 1330 (CA9 1991). 510 U. S. 975 (1993).

II

The question in these cases is how the choice-of-law clause and the exemption clause of § 921(a)(20) are related. If, as the Fourth Circuit held, the choice-of-law clause applies to the exemption clause, then we must look to whether Beecham's and Jones' civil rights were restored under federal law (the law of the jurisdiction in which the earlier proceedings were held). On the other hand, if, as the Eighth and Ninth Circuits concluded, the two clauses ought to be read separately, see *Geyler, supra*, at 1334–1335; *Edwards, supra*, at 1349–1350, then we would have to come up with a special choice-of-law principle for the exemption clause.

We think the Fourth Circuit's reading is the better one. Throughout the statutory scheme, the inquiry is: Does the person have a qualifying conviction on his record? Section 922(g) imposes a disability on people who "ha[ve] been convicted." The choice-of-law clause defines the rule for determining "[w]hat constitutes a conviction." The exemption clause says that a conviction for which a person has had civil rights restored "shall not be considered a conviction." Asking whether a person has had civil rights restored is thus just one step in determining whether something should "be considered a conviction." By the terms of the choice-of-law clause, this determination is governed by the law of the convicting jurisdiction.

This interpretation is supported by the fact that the other three procedures listed in the exemption clause—pardons, expungements, and set-asides—are either always or almost always (depending on whether one considers a federal grant of habeas corpus to be a "set-aside," a question we do not now decide) done by the jurisdiction of conviction. That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well. *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990); *Third Nat. Bank in Nashville* v. *Impac Limited, Inc.*, 432 U. S. 312, 322 (1977); *Jarecki* v. *G. D. Searle & Co.*, 367 U. S. 303, 307 (1961). Though this canon of construction is by no means a hard and fast rule, it is a factor pointing toward the Fourth Circuit's construction of the statute.

In light of the statutory structure, the fact that both clauses speak of "conviction[s]" rebuts the Eighth and Ninth Circuits' argument that the two clauses "pertain to two entirely different sets of circumstances"—"the question of what constitutes a conviction" and "the effect of post-conviction events." *Geyler, supra,* at 1334–1335; see also *Edwards, supra,* at 1349. The exemption clause does not simply say that a person whose civil rights have been restored is exempted from § 922(g)'s firearms disqualification. It says that the person's conviction "shall not be considered a conviction." The effect of postconviction events is therefore, under the statutory scheme, just one element of the question of what constitutes a conviction.

Likewise, the presence of the choice-of-law clause rebuts the Eighth and Ninth Circuits' argument that the "plain, unlimited language," *Edwards, supra,* at 1349; see also *Geyler, supra,* at 1334, of the exemption clause—with its reference to "*[a]ny conviction* . . . for which a person has . . . had civil rights restored" (emphasis added)—refers to all civil rights restorations, even those by a jurisdiction other than the one in which the conviction was entered. Regardless of what the quoted phrase might mean standing alone, in conjunction with the choice-of-law clause it must refer only to restorations of civil rights by the convicting jurisdiction. The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences. See *King* v. *St. Vincent's Hospital,* 502 U. S. 215, 221 (1991); *Massachusetts* v. *Morash,* 490 U. S. 107, 115 (1989); *Shell Oil Co.* v. *Iowa Dept. of Revenue,* 488 U. S. 19, 26 (1988).

We are also unpersuaded by the Ninth Circuit's argument that "[b]ecause there is no federal procedure for restoring civil rights to a federal felon, Congress could not have expected that the federal government would perform this function," and that therefore "[t]he reference in § 921(a)(20) to the restoration of civil rights must be to the state procedure."

Geyler, 932 F. 2d, at 1333.* This reasoning assumes that Congress intended felons convicted by all jurisdictions to have access to all the procedures (pardon, expungement, set-aside, and civil rights restoration) specified in the exemption clause; but nothing in § 921(a)(20) supports the assumption on which this reasoning is based. Many jurisdictions have no procedure for restoring civil rights. See Apps. A and B to Brief for Petitioners (indicating that at least 11 States—Arkansas, Indiana, Kentucky, Maryland, Missouri, New Jersey, Oklahoma, Pennsylvania, Texas, Vermont, and Virginia suspend felons' civil rights but provide no procedure for restoring them); see, *e. g.*, Mo. Rev. Stat. § 561.026 (1979 and Supp. 1994); *United States* v. *Thomas*, 991 F. 2d 206, 213–214 (CA5) (Texas law), cert. denied, 510 U. S. 1014 (1993). However one reads the statutory scheme—as looking to the law of the convicting jurisdiction, or to the law of the State in which the prior conduct took place, or to the law of the State in which the felon now lives or has at one time lived—people in some jurisdictions would have options open to them that people in other jurisdictions may lack. Under our reading of the statute, a person convicted in federal court is no worse off than a person convicted in a court of a State that does not restore civil rights.

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*We express no opinion on whether a federal felon cannot have his civil rights restored under federal law. This is a complicated question, one which involves the interpretation of the federal law relating to federal civil rights, see U. S. Const., Art. I, § 2, cl. 1 (right to vote for Representatives); U. S. Const., Amdt. XVII (right to vote for Senators); 28 U. S. C. § 1865 (right to serve on a jury); consideration of the possible relevance of 18 U. S. C. § 925(c) (1988 ed., Supp. IV), which allows the Secretary of the Treasury to grant relief from the disability imposed by § 922(g); and the determination whether civil rights must be restored by an affirmative act of a Government official, see *United States* v. *Ramos*, 961 F. 2d 1003, 1008 (CA1), cert. denied, 506 U. S. 934 (1992), or whether they may be restored automatically by operation of law, see *United States* v. *Hall*, 20 F. 3d 1066 (CA10 1994). We do not address these matters today.

Because the statutory language is unambiguous, the rule of lenity, which petitioners urge us to employ here, is inapplicable. See *Chapman* v. *United States,* 500 U. S. 453, 463–464 (1991). Of course, by denying the existence of an ambiguity, we do not claim to be perfectly certain that we have divined Congress' intentions as to this particular situation. It is possible that the phrases on which our reading of the statute turns—"[w]hat constitutes a conviction" and "shall not be considered a conviction"—were accidents of statutory drafting; it is possible that some legislators thought the two sentences of § 921(a)(20) should be read separately, or, more likely, that they never considered the matter at all. And we recognize that in enacting the choice-of-law clause, legislators may have been simply responding to our decision in *Dickerson* v. *New Banner Institute, Inc.,* 460 U. S. 103 (1983), which held that federal law rather than state law controls the definition of what constitutes a conviction, not setting forth a choice-of-law principle for the restoration of civil rights following a conviction.

But our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider petitioners' particular cases. Rather, it is to determine whether the language the legislators actually enacted has a plain, unambiguous meaning. In this instance, we believe it does.

III

We therefore conclude that petitioners can take advantage of § 921(a)(20) only if they have had their civil rights restored under federal law, and accordingly affirm the judgment of the Court of Appeals.

So ordered.

KOKKONEN *v.* GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-263. Argued March 1, 1994—Decided May 16, 1994

Following respondent's termination of an agency agreement between the parties, petitioner brought a state-court suit alleging state-law claims. Respondent removed the case to the Federal District Court on diversity grounds and filed state-law counterclaims. The parties subsequently arrived at a settlement agreement and, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), executed a Stipulation and Order of Dismissal with Prejudice, which did not refer to the settlement agreement or reserve District Court jurisdiction to enforce it. After the District Judge signed the Stipulation and Order, a dispute arose as to petitioner's obligations under the settlement agreement. Respondent filed a motion to enforce the agreement, which petitioner opposed on the ground, *inter alia,* that the court lacked subject-matter jurisdiction. The District Court entered an enforcement order, asserting that it had "inherent power" to do so. The Court of Appeals agreed and affirmed.

Held: A federal district court, possessing only that power authorized by Constitution and statute, lacks jurisdiction over a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute. Moreover, the doctrine of ancillary jurisdiction does not apply, since the facts to be determined with regard to the alleged breach of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business. *Julian* v. *Central Trust Co.,* 193 U. S. 93, 113-114, distinguished. If the parties *wish* to provide for the court's jurisdiction to enforce a dismissal-producing settlement agreement, they can seek to do so. In the event of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2), the court may, in its discretion, make the parties' compliance with the terms of the settlement agreement (or retention of jurisdiction over the agreement) part of its order. When dismissal occurs pursuant to Rule 41(a)(1)(ii), the district court is empowered (with the consent of the parties) to incorporate the settlement agreement in the order or retain jurisdiction over the settlement contract itself. Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction. Pp. 377–382.

993 F. 2d 883, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Michael Reynolds Jencks argued the cause and filed briefs for petitioner.

Frank C. Morris, Jr., argued the cause for respondent. With him on the brief were *Thomas R. Bagby* and *Andrea R. Calem.**

JUSTICE SCALIA delivered the opinion of the Court.

After respondent Guardian Life Insurance Company[1] terminated petitioner's general agency agreement, petitioner brought suit in California Superior Court alleging various state-law claims. Respondent removed the case to the United States District Court for the Eastern District of California on the basis of diversity jurisdiction and filed state-law counterclaims. After closing arguments but before the District Judge instructed the jury, the parties arrived at an oral agreement settling all claims and counterclaims, the substance of which they recited, on the record, before the District Judge in chambers. In April 1992, pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), the parties executed a

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*A brief of *amici curiae* urging reversal was filed for the State of Ohio et al. by *Lee Fisher*, Attorney General of Ohio, *Richard A. Cordray*, State Solicitor, and *Simon B. Karas*, *Charles E. Cole*, Attorney General of Alaska, *John Payton*, Corporation Counsel of the District of Columbia, *Roland W. Burris*, Attorney General of Illinois, *Robert T. Stephan*, Attorney General of Kansas, *Scott Harshbarger*, Attorney General of Massachusetts, *Joe Mazurek*, Attorney General of Montana, *Susan B. Loving*, Attorney General of Oklahoma, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, and *Stephen Rosenthal*, Attorney General of Virginia.

[1] Guardian Life is the sole respondent. The Guardian Insurance and Annuity Corporation and the Guardian Investor Services Corporation were listed as appellees below, but in fact they had been dismissed prior to trial.

Stipulation and Order of Dismissal with Prejudice, dismissing the complaint and cross-complaint. On April 13, the District Judge signed the Stipulation and Order under the notation "It is so ordered." The Stipulation and Order did not reserve jurisdiction in the District Court to enforce the settlement agreement; indeed, it did not so much as refer to the settlement agreement.

Thereafter the parties disagreed on petitioner's obligation to return certain files to respondent under the settlement agreement. On May 21, respondent moved in the District Court to enforce the agreement, which petitioner opposed on the ground, *inter alia*, that the court lacked subject-matter jurisdiction. The District Court entered an enforcement order, asserting an "inherent power" to do so. Order Enforcing Settlement (ED Cal., Aug. 19, 1992), App. 180. Petitioner appealed, relying solely on his jurisdictional objection. The United States Court of Appeals for the Ninth Circuit affirmed, quoting its opinion in *Wilkinson* v. *FBI*, 922 F. 2d 555, 557 (1991), to the effect that after dismissal of an action pursuant to a settlement agreement, a "'district court ha[s] jurisdiction to decide the [enforcement] motion[] under its inherent supervisory power.'" App. to Pet. for Cert. A–5 (Apr. 27, 1993) (unpublished), judgt. order reported at 993 F. 2d 883 (1993) (final brackets in original). We granted certiorari, 510 U. S. 930 (1993).

Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, see *Willy* v. *Coastal Corp.*, 503 U. S. 131, 136–137 (1992); *Bender* v. *Williamsport Area School Dist.*, 475 U. S. 534, 541 (1986), which is not to be expanded by judicial decree, *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6 (1951). It is to be presumed that a cause lies outside this limited jurisdiction, *Turner* v. *Bank of North-America*, 4 Dall. 8, 11 (1799), and the burden of establishing the contrary rests upon the party asserting jurisdiction, *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, 182–183 (1936).

The dismissal in this case issued pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii), which provides for dismissal "by filing a stipulation of dismissal signed by all parties who have appeared in the action," and causes that dismissal to be with prejudice if (as here) the stipulation so specifies. Neither the Rule nor any provision of law provides for jurisdiction of the court over disputes arising out of an agreement that produces the stipulation. It must be emphasized that what respondent seeks in this case is enforcement of the settlement agreement, and not merely reopening of the dismissed suit by reason of breach of the agreement that was the basis for dismissal. Some Courts of Appeals have held that the latter can be obtained under Federal Rule of Civil Procedure 60(b)(6).[2] See, *e. g., Keeling* v. *Sheet Metal Workers Int'l Assn.*, 937 F. 2d 408, 410 (CA9 1991); *Fairfax Countywide Citizens Assn.* v. *Fairfax County*, 571 F. 2d 1299, 1302–1303 (CA4 1978). But see *Sawka* v. *Healtheast, Inc.*, 989 F. 2d 138, 140–141 (CA3 1993) (breach of settlement agreement insufficient reason to set dismissal aside on Rule 60(b)(6) grounds); *Harman* v. *Pauley*, 678 F. 2d 479, 480–481 (CA4 1982) (Rule 60(b)(6) does not require vacating dismissal order whenever a settlement agreement has been breached). Enforcement of the settlement agreement, however, whether through award of damages or decree of specific performance, is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction.

Respondent relies upon the doctrine of ancillary jurisdiction, which recognizes federal courts' jurisdiction over some matters (otherwise beyond their competence) that are incidental to other matters properly before them. Respondent appeals to our statement (quoting a then-current treatise on equity) in *Julian* v. *Central Trust Co.*, 193 U. S. 93 (1904): "A bill filed to continue a former litigation in the same court . . . to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties . . . or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, . . . is an ancillary suit." *Id.*, at 113–114 (citing 1 C. Bates, Federal Equity Procedure § 97 (1901)).

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[2] The relevant provision of that Rule reads as follows:

"On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment."

The doctrine of ancillary jurisdiction can hardly be criticized for being overly rigid or precise, but we think it does not stretch so far as that statement suggests. The expansive language of *Julian* can be countered by (equally inaccurate) dicta in later cases that provide an excessively limited description of the doctrine. See, *e. g., Fulton Nat. Bank of Atlanta* v. *Hozier*, 267 U. S. 276, 280 (1925) ("[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit"). The holding of *Julian* was not remotely as permissive as its language: Jurisdiction was based upon the fact that the court, in a prior decree of foreclosure, had *expressly reserved* jurisdiction to adjudicate claims against the judicially conveyed property, and to retake and resell the property if claims it found valid were not paid. 193 U. S., at 109–112.

It is to the holdings of our cases, rather than their dicta, that we must attend, and we find none of them that has, for purposes of asserting otherwise nonexistent federal jurisdiction, relied upon a relationship so tenuous as the breach of an agreement that produced the dismissal of an earlier federal suit. Generally speaking, we have asserted ancillary jurisdiction (in the very broad sense in which that term is sometimes used) for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, see, *e. g., Baker* v. *Gold Seal Liquors, Inc.*, 417 U. S. 467, 469, n. 1 (1974); *Moore* v. *New York Cotton Exchange,* 270 U. S. 593, 610 (1926); and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees, see, *e. g., Chambers* v. *NASCO, Inc.*, 501 U. S. 32 (1991) (power to compel payment of opposing party's attorney's fees as sanction for misconduct); *United States* v. *Hudson*, 7 Cranch 32, 34 (1812) (contempt power to maintain order during proceedings). See generally 13 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3523 (1984); cf. 28 U. S. C. §1367 (1988 ed., Supp. IV).

Neither of these heads supports the present assertion of jurisdiction. As to the first, the facts underlying respondent's dismissed claim for breach of agency agreement and those underlying its claim for breach of settlement agreement have nothing to do with each other; it would neither be necessary nor even particularly efficient that they be adjudicated together. No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.

But it is the second head of ancillary jurisdiction, relating to the court's power to protect its proceedings and vindicate its authority, that both courts in the present case appear to have relied upon, judging from their references to "inherent power," see App. to Pet. for Cert. A–2 and A–5; App. 180. We think, however, that the power asked for here is quite remote from what courts require in order to perform their functions. We have recognized inherent authority to appoint counsel to investigate and prosecute violation of a court's order. *Young* v. *United States ex rel. Vuitton et Fils S. A.*, 481 U. S. 787 (1987). But the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist. That, however, was not the case here. The judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order.

The short of the matter is this: The suit involves a claim for breach of a contract, part of the consideration for which was dismissal of an earlier federal suit. No federal statute makes that connection (if it constitutionally could) the basis for federal-court jurisdiction over the contract dispute. The facts to be determined with regard to such alleged breaches of contract are quite separate from the facts to be determined in the principal suit, and automatic jurisdiction over such contracts is in no way essential to the conduct of federal-court business. If the parties *wish* to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. When the dismissal is pursuant to Federal Rule of Civil Procedure 41(a)(2), which specifies that the action "shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper," the parties' compliance with the terms of the settlement contract (or the court's "retention of jurisdiction" over the settlement contract) may, in the court's discretion, be one of the terms set forth in the order. Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties' stipulation of dismissal) we think the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree. Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

C & A CARBONE, INC., ET AL. *v.* TOWN OF CLARKSTOWN, NEW YORK

CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT

No. 92–1402. Argued December 7, 1993—Decided May 16, 1994

Respondent town agreed to allow a private contractor to construct within town limits a solid waste transfer station to separate recyclable from nonrecyclable items and to operate the facility for five years, at which time the town would buy it for one dollar. To finance the transfer station's cost, the town guaranteed a minimum waste flow to the facility, for which the contractor could charge the hauler a tipping fee which exceeded the disposal cost of unsorted solid waste on the private market. In order to meet the waste flow guarantee, the town adopted a flow control ordinance, requiring all nonhazardous solid waste within the town to be deposited at the transfer station. While recyclers like petitioners (collectively Carbone) may receive solid waste at their own sorting facilities, the ordinance requires them to bring nonrecyclable residue to the transfer station, thus forbidding them to ship such waste themselves and requiring them to pay the tipping fee on trash that has already been sorted. After discovering that Carbone was shipping nonrecyclable waste to out-of-state destinations, the town filed suit in state court, seeking an injunction requiring that this residue be shipped to the transfer station. The court granted summary judgment to the town, finding the ordinance constitutional, and the Appellate Division affirmed.

Held: The flow control ordinance violates the Commerce Clause. Pp. 389–395.

(a) The ordinance regulates interstate commerce. While its immediate effect is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach. By requiring Carbone to send the nonrecyclable portion of waste it receives from out of State to the transfer station at an additional cost, the ordinance drives up the cost for out-of-state interests to dispose of their solid waste. It also deprives out-of-state businesses of access to the local market, by preventing everyone except the favored local operator from performing the initial processing step. P. 389.

(b) The ordinance discriminates against interstate commerce, and thus is invalid. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624. Although the ordinance erects no barrier to the import or export of any solid waste, the article of commerce here is not so much the waste itself, but rather the service of processing and disposing of it. With respect to this stream of commerce, the ordinance discriminates, for it allows only the favored operator to process waste that is within the town's limits. It is no less discriminatory because in-state or in-town processors are also covered by the prohibition. Cf., *e. g., Dean Milk Co.* v. *Madison,* 340 U. S. 349. Favoring a single local proprietor makes the ordinance's protectionist effect even more acute, for it squelches competition in the waste-processing service altogether, leaving no room for outside investment. Pp. 389–392.

(c) The town does not lack other means to advance a legitimate local interest. It could address alleged health and safety problems through nondiscriminatory alternatives, such as uniform safety regulations that would ensure that competitors do not underprice the market by cutting corners on environmental safety. Justifying the ordinance as a way to steer solid waste away from out-of-town disposal sites that the town might deem harmful to the environment would extend its police power beyond its jurisdictional boundaries. Moreover, the ordinance's revenue generating purpose by itself is not a local interest that can justify discrimination against interstate commerce. If special financing is needed to ensure the transfer station's long-term survival, the town may subsidize the facility through general taxes or municipal bonds, but it may not employ discriminatory regulation to give the project an advantage over rival out-of-state businesses. Pp. 392–395.

182 App. Div. 2d 213, 587 N. Y. S. 2d 681, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SCALIA, THOMAS, and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, *post,* p. 401. SOUTER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and BLACKMUN, J., joined, *post,* p. 410.

Betty Jo Christian argued the cause for petitioners. With her on the briefs were *Paul J. Ondrasik, Jr., David Silverman, Kenneth Resnik,* and *Charles G. Cole.*

William C. Brashares argued the cause for respondent. With him on the brief were *Murray N. Jacobson* and *Richard A. Glickel.**

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*Briefs of *amici curiae* urging reversal were filed for Incorporated Villages of Westbury, Mineola, and New Hyde Park et al. by *Lawrence W. Boes, Jerome F. Matedero, John M. Spellman,* and *Donna M. C. Giliberto;*

JUSTICE KENNEDY delivered the opinion of the Court.

As solid waste output continues apace and landfill capacity becomes more costly and scarce, state and local governments

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for the Chemical Manufacturers Association et al. by *Theodore L. Garrett;* and for the National Solid Wastes Management Association by *Bruce L. Thall* and *Bruce J. Parker.*

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey by *Robert J. Del Tufo,* Attorney General, *Mary C. Jacobson,* Assistant Attorney General, and *Carla Vivian Bello,* Senior Deputy Attorney General; for the State of Ohio et al. by *Lee Fisher,* Attorney General, and *Susan E. Ashbrook* and *Bryan F. Zima,* Assistant Attorneys General; and by the Attorneys General and other officials for their respective jurisdictions as follows: *Charles E. Cole,* Attorney General of Alaska, *Grant Woods,* Attorney General of Arizona, *Richard Blumenthal,* Attorney General of Connecticut, *Charles M. Oberly III,* Attorney General of Delaware, *Robert A. Butterworth,* Attorney General of Florida, *Robert A. Marks,* Attorney General of Hawaii, *Roland W. Burris,* Attorney General of Illinois, *Pamela Carter,* Attorney General of Indiana, *Bonnie J. Campbell,* Attorney General of Iowa, *Michael E. Carpenter,* Attorney General of Maine, *Scott Harshbarger,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Beverly Connerton* and *Stephen Shakman,* Assistant Attorneys General, *Joseph P. Mazurek,* Attorney General of Montana, *Michael F. Easley,* Attorney General of North Carolina, *Theodore R. Kulongoski,* Attorney General of Oregon, *Ernest D. Preate, Jr.,* Attorney General of Pennsylvania, *Pedro R. Pierluisi,* Attorney General of Puerto Rico, *T. Travis Medlock,* Attorney General of South Carolina, *Stephen D. Rosenthal,* Attorney General of Virginia, and *James E. Doyle,* Attorney General of Wisconsin; for the State of New York et al. by *Robert Abrams,* Attorney General, *Jerry Boone,* Solicitor General, *Andrea Green,* Deputy Solicitor General, *John J. Sipos* and *Gordon J. Johnson,* Assistant Attorneys General, *O. Peter Sherwood, Leonard J. Koerner,* and *Martin Gold;* for Prince George's County, Maryland, et al. by *Lewis A. Noonberg, Charles W. Thompson, Jr.,* and *Michael P. Whalen;* for Rockland County, New York, by *Ilan S. Schoenberger,* for the County of San Diego, California, by *Lloyd M. Harmon, Jr., Diane Bardsley, Scott H. Peters, W. Cullen MacDonald, Eric S. Petersen,* and *Jerome A. Barron;* for the City of Indianapolis, Indiana, et al. by *Scott M. DuBoff, Pamela K. Akin, Felshaw King, Mary Anne Wood, Michael F. X. Gillin, John D. Pirich, David P. Bobzien, Robert C. Cannon,* and *Patrick T. Boulden;* for the City of Springfield, Missouri, by *Stuart H. Newberger, Jeffrey H. How-*

are expending significant resources to develop trash control systems that are efficient, lawful, and protective of the environment. The difficulty of their task is evident from the number of recent cases that we have heard involving waste transfer and treatment. See *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978); *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353 (1992); *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore., ante,* p. 93. The case decided today, while perhaps a small new chapter in that course of decisions, rests nevertheless upon well-settled principles of our Commerce Clause jurisprudence.

We consider a so-called flow control ordinance, which requires all solid waste to be processed at a designated transfer station before leaving the municipality. The avowed purpose of the ordinance is to retain the processing fees charged at the transfer station to amortize the cost of the facility. Because it attains this goal by depriving competitors, including out-of-state firms, of access to a local market, we hold that the flow control ordinance violates the Commerce Clause.

The town of Clarkstown, New York, lies in the lower Hudson River Valley, just upstream from the Tappan Zee Bridge and by highway minutes from New Jersey. Within the town limits are the village of Nyack and the hamlet of West Nyack. In August 1989, Clarkstown entered into a consent

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ard, and *Clifton S. Elgarten;* for the Town of Smithtown, New York, et al. by *W. Cullen MacDonald, Richard L. Sigal, Eric S. Petersen,* and *Jon A. Gerber;* for the Solid Waste Disposal Authority of the city of Huntsville, Alabama, by *Charles H. Younger;* for the Clarendon Foundation by *Ronald D. Maines;* for the National Association of Bond Lawyers by *C. Baird Brown, Robert B. McKinstry, Jr.,* and *Brendan K. Collins;* for the National Association of Counties et al. by *Richard Ruda;* for Ogden Projects, Inc., by *Robert C. Bernius* and *Jeffrey R. Horowitz;* and for the Solid Waste Association of North America et al. by *Barry S. Shanoff, B. Richard Marsh,* and *Robert D. Thorington.*

decree with the New York State Department of Environmental Conservation. The town agreed to close its landfill located on Route 303 in West Nyack and build a new solid waste transfer station on the same site. The station would receive bulk solid waste and separate recyclable from nonrecyclable items. Recyclable waste would be baled for shipment to a recycling facility; nonrecyclable waste, to a suitable landfill or incinerator.

The cost of building the transfer station was estimated at $1.4 million. A local private contractor agreed to construct the facility and operate it for five years, after which the town would buy it for $1. During those five years, the town guaranteed a minimum waste flow of 120,000 tons per year, for which the contractor could charge the hauler a so-called tipping fee of $81 per ton. If the station received less than 120,000 tons in a year, the town promised to make up the tipping fee deficit. The object of this arrangement was to amortize the cost of the transfer station: The town would finance its new facility with the income generated by the tipping fees.

The problem, of course, was how to meet the yearly guarantee. This difficulty was compounded by the fact that the tipping fee of $81 per ton exceeded the disposal cost of unsorted solid waste on the private market. The solution the town adopted was the flow control ordinance here in question, Local Laws 1990, No. 9 of the Town of Clarkstown (full text in Appendix). The ordinance requires all nonhazardous solid waste within the town to be deposited at the Route 303 transfer station. *Id.*, § 3.C (waste generated within the town), § 5.A (waste generated outside and brought in). Noncompliance is punishable by as much as a $1,000 fine and up to 15 days in jail. § 7.

The petitioners in this case are C & A Carbone, Inc., a company engaged in the processing of solid waste, and various related companies or persons, all of whom we designate Carbone. Carbone operates a recycling center in Clarkstown, where it receives bulk solid waste, sorts and bales it, and then ships it to other processing facilities—much as occurs at the town's new transfer station. While the flow control ordinance permits recyclers like Carbone to continue receiving solid waste, § 3.C, it requires them to bring the nonrecyclable residue from that waste to the Route 303 station. It thus forbids Carbone to ship the nonrecyclable waste itself, and it requires Carbone to pay a tipping fee on trash that Carbone has already sorted.

In March 1991, a tractor-trailer containing 23 bales of solid waste struck an overpass on the Palisades Interstate Parkway. When the police investigated the accident, they discovered the truck was carrying household waste from Carbone's Clarkstown plant to an Indiana landfill. The Clarkstown police put Carbone's plant under surveillance and in the next few days seized six more tractor-trailers leaving the facility. The trucks also contained nonrecyclable waste, originating both within and without the town, and destined for disposal sites in Illinois, Indiana, West Virginia, and Florida.

The town of Clarkstown sued Carbone in New York Supreme Court, Rockland County, seeking an injunction requiring Carbone to ship all nonrecyclable waste to the Route 303 transfer station. Carbone responded by suing in United States District Court to enjoin the flow control ordinance. On July 11, the federal court granted Carbone's injunction, finding a sufficient likelihood that the ordinance violated the Commerce Clause of the United States Constitution. *C. & A. Carbone, Inc.* v. *Clarkstown,* 770 F. Supp. 848 (SDNY 1991).

Four days later, the New York court granted summary judgment to respondent. The court declared the flow control ordinance constitutional and enjoined Carbone to comply with it. The federal court then dissolved its injunction.

The Appellate Division affirmed. 182 App. Div. 2d 213, 587 N. Y. S. 2d 681 (2d Dept. 1992). The court found that the ordinance did not discriminate against interstate commerce because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." *Id.*, at 222, 587 N. Y. S. 2d, at 686. The New York Court of Appeals denied Carbone's motion for leave to appeal. 80 N. Y. 2d 760, 605 N. E. 2d 874 (1992). We granted certiorari, 508 U. S. 938 (1993), and now reverse.

At the outset we confirm that the flow control ordinance does regulate interstate commerce, despite the town's position to the contrary. The town says that its ordinance reaches only waste within its jurisdiction and is in practical effect a quarantine: It prevents garbage from entering the stream of interstate commerce until it is made safe. This reasoning is premised, however, on an outdated and mistaken concept of what constitutes interstate commerce.

While the immediate effect of the ordinance is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach. The Carbone facility in Clarkstown receives and processes waste from places other than Clarkstown, including from out of State. By requiring Carbone to send the nonrecyclable portion of this waste to the Route 303 transfer station at an additional cost, the flow control ordinance drives up the cost for out-of-state interests to dispose of their solid waste. Furthermore, even as to waste originant in Clarkstown, the ordinance prevents everyone except the favored local operator from performing the initial processing step. The ordinance thus deprives out-of-state businesses of access to a local market. These economic effects are more than enough to bring the Clarkstown ordinance within the purview of the Commerce Clause. It is well settled that actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 31 (1937).

The real question is whether the flow control ordinance is valid despite its undoubted effect on interstate commerce.

For this inquiry, our case law yields two lines of analysis: first, whether the ordinance discriminates against interstate commerce, *Philadelphia,* 437 U. S., at 624; and second, whether the ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits," *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970). As we find that the ordinance discriminates against interstate commerce, we need not resort to the *Pike* test.

The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent. See The Federalist No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901). We have interpreted the Commerce Clause to invalidate local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State. See, *e. g.*, *Philadelphia, supra* (striking down New Jersey statute that prohibited the import of solid waste); *Hughes* v. *Oklahoma,* 441 U. S. 322 (1979) (striking down Oklahoma law that prohibited the export of natural minnows).

Clarkstown protests that its ordinance does not discriminate because it does not differentiate solid waste on the basis of its geographic origin. All solid waste, regardless of origin, must be processed at the designated transfer station before it leaves the town. Unlike the statute in *Philadelphia,* says the town, the ordinance erects no barrier to the import or export of any solid waste but requires only that the waste be channeled through the designated facility.

Our initial discussion of the effects of the ordinance on interstate commerce goes far toward refuting the town's contention that there is no discrimination in its regulatory scheme. The town's own arguments go the rest of the way. As the town itself points out, what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it.

With respect to this stream of commerce, the flow control ordinance discriminates, for it allows only the favored operator to process waste that is within the limits of the town. The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition. In *Dean Milk Co.* v. *Madison*, 340 U. S. 349 (1951), we struck down a city ordinance that required all milk sold in the city to be pasteurized within five miles of the city lines. We found it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.*, at 354, n. 4. Accord, *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S., at 361 ("[O]ur prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself").

In this light, the flow control ordinance is just one more instance of local processing requirements that we long have held invalid. See *Minnesota* v. *Barber*, 136 U. S. 313 (1890) (striking down a Minnesota statute that required any meat sold within the State, whether originating within or without the State, to be examined by an inspector within the State); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928) (striking down a Louisiana statute that forbade shrimp to be exported unless the heads and hulls had first been removed within the State); *Johnson* v. *Haydel*, 278 U. S. 16 (1928) (striking down analogous Louisiana statute for oysters); *Toomer* v. *Witsell*, 334 U. S. 385 (1948) (striking down South Carolina statute that required shrimp fishermen to unload, pack, and stamp their catch before shipping it to another State); *Pike* v. *Bruce Church, Inc., supra* (striking down

Arizona statute that required all Arizona-grown cantaloupes to be packaged within the State prior to export); *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U. S. 82 (1984) (striking down an Alaska regulation that required all Alaska timber to be processed within the State prior to export). The essential vice in laws of this sort is that they bar the import of the processing service. Out-of-state meat inspectors, or shrimp hullers, or milk pasteurizers, are deprived of access to local demand for their services. Put another way, the offending local laws hoard a local resource—be it meat, shrimp, or milk—for the benefit of local businesses that treat it.

The flow control ordinance has the same design and effect. It hoards solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility. The only conceivable distinction from the cases cited above is that the flow control ordinance favors a single local proprietor. But this difference just makes the protectionist effect of the ordinance more acute. In *Dean Milk,* the local processing requirement at least permitted pasteurizers within five miles of the city to compete. An out-of-state pasteurizer who wanted access to that market might have built a pasteurizing facility within the radius. The flow control ordinance at issue here squelches competition in the waste-processing service altogether, leaving no room for investment from outside.

Discrimination against interstate commerce in favor of local business or investment is *per se* invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest. *Maine* v. *Taylor,* 477 U. S. 131 (1986) (upholding Maine's ban on the import of baitfish because Maine had no other way to prevent the spread of parasites and the adulteration of its native fish species). A number of *amici* contend that the flow control ordinance fits into this narrow class. They suggest that as landfill space diminishes and environmental cleanup costs escalate, measures like flow control become necessary to ensure the safe handling and proper treatment of solid waste.

The teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem. The Commerce Clause presumes a national market free from local legislation that discriminates in favor of local interests. Here Clarkstown has any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question. The most obvious would be uniform safety regulations enacted without the object to discriminate. These regulations would ensure that competitors like Carbone do not underprice the market by cutting corners on environmental safety.

Nor may Clarkstown justify the flow control ordinance as a way to steer solid waste away from out-of-town disposal sites that it might deem harmful to the environment. To do so would extend the town's police power beyond its jurisdictional bounds. States and localities may not attach restrictions to exports or imports in order to control commerce in other States. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935) (striking down New York law that prohibited the sale of milk unless the price paid to the original milk producer equaled the minimum required by New York).

The flow control ordinance does serve a central purpose that a nonprotectionist regulation would not: It ensures that the town-sponsored facility will be profitable, so that the local contractor can build it and Clarkstown can buy it back at nominal cost in five years. In other words, as the most candid of *amici* and even Clarkstown admit, the flow control ordinance is a financing measure. By itself, of course, revenue generation is not a local interest that can justify discrimination against interstate commerce. Otherwise States could impose discriminatory taxes against solid waste originating outside the State. See *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334 (1992) (striking down Alabama statute that imposed additional fee on all hazardous waste generated outside the State and disposed of within the State); *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore., ante,* p. 93 (striking down Oregon statute that imposed additional fee on solid waste generated outside the State and disposed of within the State).

Clarkstown maintains that special financing is necessary to ensure the long-term survival of the designated facility. If so, the town may subsidize the facility through general taxes or municipal bonds. *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269, 278 (1988). But having elected to use the open market to earn revenues for its project, the town may not employ discriminatory regulation to give that project an advantage over rival businesses from out of State.

Though the Clarkstown ordinance may not in explicit terms seek to regulate interstate commerce, it does so nonetheless by its practical effect and design. In this respect the ordinance is not far different from the state law this Court found invalid in *Buck* v. *Kuykendall,* 267 U. S. 307 (1925). That statute prohibited common carriers from using state highways over certain routes without a certificate of public convenience. Writing for the Court, Justice Brandeis said of the law: "Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner." *Id.,* at 315–316.

State and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities. We reverse the judgment and remand the case for proceedings not inconsistent with this decision.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

TOWN OF CLARKSTOWN

Local Law No. 9 of the year 1990

A local law entitled, "SOLID WASTE TRANSPORTATION AND DISPOSAL."

Be it enacted by the TOWN BOARD of the Town of CLARKSTOWN as follows:

Section 1. Definitions

Unless otherwise stated expressly, the following words and expressions, where used in this chapter, shall have the meanings ascribed to them by this section:

ACCEPTABLE WASTE—All residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge.

CONSTRUCTION AND DEMOLITION DEBRIS—Uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm related cleanup. Such waste includes, but is not limited to bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, electrical wiring and components containing no hazardous liquids, metals, brush grass clippings and leaves that are incidental to any of the above.

HAZARDOUS WASTE—All solid waste designated as such under the Environmental Conservation Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976 or any other applicable law.

PATHOLOGICAL WASTE—Waste material which may be considered infectious or biohazardous, originating from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities and includes equipment, instruments, utensils, fomites, laboratory waste (including pathological specimens and fomites attendant thereto), surgical facilities, equipment, bedding and utensils (including pathological specimens and disposal fomites attendant thereto), sharps (hypodermic needles, syringes, etc.), dialysis unit waste, animal carcasses, offal and body parts, biological materials, (vaccines, medicines, etc.) and other similar materials, but does not include any such waste material which is determined by evidence satisfactory to the Town to have been rendered non-infectious and non-biohazardous.

PERSONS—Any individual, partnership, corporation, association, trust, business trust, joint venturer, governmental body or other entity, howsoever constituted.

UNACCEPTABLE WASTE—Hazardous Waste, Pathological Waste and sludge.

SLUDGE—Solid, semi-solid or liquid waste generated from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility.

TOWN—When used herein, refers to the Town of Clarkstown.

Section 2. General Provisions

A. Intent; Purpose.

I. The intent and purpose of this chapter is to provide for the transportation and disposition of all solid waste within or generated within the Town of Clarkstown so that all acceptable solid waste generated within the Town is delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York and such other sites, situate in the Town, as may be approved by the Town for recycling, processing or for other disposition or handling of acceptable solid waste.

II. The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

B. Supervision and Regulation.

The Town Board hereby designates the Director of the Department of Environmental Control to be responsible for the supervision and regulation of the transportation and disposition of all acceptable waste generated within the Town of Clarkstown. The Director of the Department of Environmental Control shall be responsible for and shall supervise the Town's activities in connection with any waste collection and disposal agreements entered into between the Town and third parties and shall report to the Town Board with respect thereto.

C. Power to Adopt Rules and Regulations.

The Town Board may, after a public hearing, adopt such rules and regulations as may be necessary to effectuate the purposes of this chapter. At least seven (7) business days' prior notice of such public hearing shall be published in the official newspaper of the Town. A copy of all rules and regulations promulgated hereunder and any amendments thereto shall be filed in the office of the Town Clerk upon adoption and shall be effective as provided therein.

Section 3. Collection and Disposal of Acceptable Waste.

A. The removal, transportation and/or disposal of acceptable waste within or generated within the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town under this chapter and Chapter 50 and Chapter 82 of the Clarkstown Town Code, together with such rules and regulations as the Town has or may from time to time adopt.

B. All acceptable waste, as defined herein, except for construction and demolition debris, shall be removed, transported and/or disposed of only by carters licensed pursuant to the requirements of Chapter 50 of the Clarkstown Town Code and any amendments thereto. All other persons are hereby prohibited from removing, transporting or disposing of acceptable waste, except for construction and demolition debris generated within the Town of Clarkstown, and except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter and/or Chapter 50 of the Clarkstown Town Code.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown,* or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

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*In a separate zoning ordinance, the Town declared that it shall have only one designated transfer station. Town of Clarkstown Zoning Code §106-3.

Section 4. Disposal of Unacceptable Waste.

A. No unacceptable waste shall be delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York or other solid waste facility operated by the Town of Clarkstown or recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code by any person, including, without limitation, any licensed carter or any municipality. Failure to comply with the provisions of this section shall be subject to the provisions with respect to such penalties and enforcement, including the suspension or revocation of licenses and the imposition of fines, in accordance with the provisions of this chapter and/or Chapter 50 of the Clarkstown Town Code and any amendments thereto. The Town Board of Clarkstown may, by resolution, provide for the disposal of sewer sludge, generated by a municipal sewer system or the Rockland County sewer district, at a disposal facility situate within the Town of Clarkstown.

B. It shall be unlawful, within the Town, to dispose of or attempt to dispose of unacceptable waste of any kind generated within the territorial limits of the Town of Clarkstown, except for sewer sludge as provided for in Section "A" above.

Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

B. It shall be unlawful for any person to import acceptable waste or unacceptable waste from outside the Town of

Clarkstown and dump same on any property located within the Town of Clarkstown and to proceed to sift, sort, mulch or otherwise mix the said material with dirt, water, garbage, rubbish or other substance, having the effect of concealing the contents or origin of said mixture. This provision shall not apply to composting of acceptable waste carried out by the Town of Clarkstown.

Section 6. Fees for Disposal of Acceptable Waste at Town Operated Facilities.

There shall be separate fees established for disposal of acceptable waste at Town operated disposal facilities. The Town Board, by resolution adopted from time to time, shall fix the various fees to be collected at said facilities. The initial fees to be collected are those adopted by the Town Board on December 11, 1990 by Resolution Number 1097.

Section 7. Penalties for Offenses.

Notwithstanding any other provision of this chapter, the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

Section 8. Repealer; Severability.

Ordinances and local laws or parts of ordinances or local laws heretofore enacted and inconsistent with any of the terms or provisions of this chapter are hereby repealed. In the event that any portion of this chapter shall be declared invalid by a court of competent jurisdiction, such invalidity shall not be deemed to affect the remaining portions hereof.

Section 9. When Effective.

This chapter shall take effect immediately upon filing in the office of the Secretary of State.

JUSTICE O'CONNOR, concurring in the judgment.

The town of Clarkstown's flow control ordinance requires all "acceptable waste" generated or collected in the town to be disposed of only at the town's solid waste facility. Town of Clarkstown, Local Law 9, §§ 3.C–D (1990) (Local Law 9). The Court holds today that this ordinance violates the Commerce Clause because it discriminates against interstate commerce. *Ante*, at 390. I agree with the majority's ultimate conclusion that the ordinance violates the dormant Commerce Clause. In my view, however, the town's ordinance is unconstitutional not because of facial or effective discrimination against interstate commerce, but rather because it imposes an excessive burden on interstate commerce. I also write separately to address the contention that flow control ordinances of this sort have been expressly authorized by Congress, and are thus outside the purview of the dormant Commerce Clause.

I

The scope of the dormant Commerce Clause is a judicial creation. On its face, the Clause provides only that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U. S. Const., Art. I, § 8, cl. 3. This Court long ago concluded, however, that the Clause not only empowers Congress to regulate interstate commerce, but also imposes limitations on the States in the absence of congressional action:

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units. . . . [W]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." *H. P. Hood & Sons,*

> *Inc.* v. *Du Mond,* 336 U. S. 525, 537–538 (1949) (internal quotation marks and citations omitted).

Our decisions therefore hold that the dormant Commerce Clause forbids States and their subdivisions to regulate interstate commerce.

We have generally distinguished between two types of impermissible regulations. A facially nondiscriminatory regulation supported by a legitimate state interest which incidentally burdens interstate commerce is constitutional unless the burden on interstate trade is clearly excessive in relation to the local benefits. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U. S. 573, 579 (1986); *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137, 142 (1970). Where, however, a regulation "affirmatively" or "clearly" discriminates against interstate commerce on its face or in practical effect, it violates the Constitution unless the discrimination is demonstrably justified by a valid factor unrelated to protectionism. See *Wyoming* v. *Oklahoma,* 502 U. S. 437, 454 (1992); *Maine* v. *Taylor,* 477 U. S. 131, 138 (1986). Of course, there is no clear line separating these categories. "In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers, supra,* at 579.

Local Law 9 prohibits anyone except the town-authorized transfer station operator from processing discarded waste and shipping it out of town. In effect, the town has given a waste processing monopoly to the transfer station. The majority concludes that this processing monopoly facially discriminates against interstate commerce. *Ante,* at 391–392. In support of this conclusion, the majority cites previous decisions of this Court striking down regulatory enactments requiring that a particular economic activity be performed within the jurisdiction. See, *e. g., Dean Milk Co.* v. *Madison,* 340 U. S. 349 (1951) (unconstitutional for city to require milk to be pasteurized within five miles of the city); *Minnesota* v. *Barber,* 136 U. S. 313 (1890) (unconstitutional for State to require meat sold within the State to be examined by state inspector); *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1 (1928) (unconstitutional for State to require that shrimp heads and hulls must be removed before shrimp can be removed from the State); *South-Central Timber Development, Inc.* v. *Wunnicke,* 467 U. S. 82 (1984) (unconstitutional for State to require all timber to be processed within the State prior to export).

Local Law 9, however, lacks an important feature common to the regulations at issue in these cases—namely, discrimination on the basis of geographic origin. In each of the cited cases, the challenged enactment gave a competitive advantage to local business *as a group* vis-à-vis their out-of-state or nonlocal competitors *as a group.* In effect, the regulating jurisdiction—be it a State *(Pike),* a county (*Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353 (1992)), or a city *(Dean Milk)*—drew a line around itself and treated those inside the line more favorably than those outside the line. Thus, in *Pike,* the Court held that an Arizona law requiring that Arizona cantaloupes be packaged in Arizona before being shipped out of state facially discriminated against interstate commerce: The benefits of the discriminatory scheme benefited the Arizona packaging industry, at the expense of its competition in California. Similarly, in *Dean Milk,* on which the majority heavily relies, the city of Madison drew a line around its perimeter and required that all milk sold in the city be pasteurized only by dairies located inside the line. This type of geographic distinction, which confers an economic advantage on local interests in general, is common to all the local processing cases cited by the majority. And the Court has, I believe, correctly concluded that these arrangements are protectionist either in purpose or practical effect, and thus amount to virtually *per se* discrimination.

In my view, the majority fails to come to terms with a significant distinction between the laws in the local processing cases discussed above and Local Law 9. Unlike the regulations we have previously struck down, Local Law 9 does not give more favorable treatment to local interests as a group as compared to out-of-state or out-of-town economic interests. Rather, the garbage sorting monopoly is achieved at the expense of all competitors, be they local or nonlocal. That the ordinance does not discriminate on the basis of geographic origin is vividly illustrated by the identity of the plaintiffs in this very action: Petitioners are *local* recyclers, physically located *in Clarkstown,* that desire to process waste themselves, and thus bypass the town's designated transfer facility. Because in-town processors—like petitioners—and out-of-town processors are treated equally, I cannot agree that Local Law 9 "discriminates" against interstate commerce. Rather, Local Law 9 "discriminates" evenhandedly against all potential participants in the waste processing business, while benefiting only the chosen operator of the transfer facility.

I believe this distinction has more doctrinal significance than the majority acknowledges. In considering state health and safety regulations such as Local Law 9, we have consistently recognized that the fact that interests within the regulating jurisdiction are equally affected by the challenged enactment counsels against a finding of discrimination. And for good reason. The existence of substantial in-state interests harmed by a regulation is "a powerful safeguard" against legislative discrimination. *Minnesota* v. *Clover Leaf Creamery Co.,* 449 U. S. 456, 473, n. 17 (1981). The Court generally defers to health and safety regulations because "their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transp., Inc.* v. *Rice,* 434 U. S. 429, 444, n. 18 (1978). See also *Kassel* v. *Consolidated Freightways Corp. of Del.,* 450 U. S. 662, 675 (1981) (same). Thus, while there is no bright line separating those enactments which are virtually *per se* invalid and those which are not, the fact that in-town competitors of the transfer facility are equally burdened by Local Law 9 leads me to conclude that Local Law 9 does not discriminate against interstate commerce.

II

That the ordinance does not discriminate against interstate commerce does not, however, end the Commerce Clause inquiry. Even a nondiscriminatory regulation may nonetheless impose an excessive burden on interstate trade when considered in relation to the local benefits conferred. See *Brown-Forman Distillers,* 476 U. S., at 579. Indeed, we have long recognized that "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to . . . the people of the State enacting such statute." *Brimmer* v. *Rebman,* 138 U. S. 78, 83 (1891) (internal quotation marks and citation omitted). Moreover, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike,* 397 U. S., at 142. Judged against these standards, Local Law 9 fails.

The local interest in proper disposal of waste is obviously significant. But this interest could be achieved by simply requiring that all waste disposed of in the town be properly processed *somewhere.* For example, the town could ensure proper processing by setting specific standards with which all town processors must comply.

In fact, however, the town's purpose is narrower than merely ensuring proper disposal. Local Law 9 is intended to ensure the financial viability of the transfer facility. I agree with the majority that this purpose can be achieved by other means that would have a less dramatic impact on the flow of goods. For example, the town could finance the project by imposing taxes, by issuing municipal bonds, or even by lowering its price for processing to a level competitive with other waste processing facilities. But by requiring that all waste be processed at the town's facility, the ordinance "squelches competition in the waste-processing service altogether, leaving no room for investment from outside." *Ante,* at 392.

In addition, "'[t]he practical effect of [Local Law 9] must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, [jurisdiction] adopted similar legislation.'" *Wyoming* v. *Oklahoma,* 502 U. S., at 453–454 (quoting *Healy* v. *Beer Institute,* 491 U. S. 324, 336 (1989)). This is not a hypothetical inquiry. Over 20 States have enacted statutes authorizing local governments to adopt flow control laws.* If the localities in these States impose the type of restriction on the movement of waste that Clarkstown has adopted, the free movement of solid waste in the stream of commerce will be severely impaired. Indeed, pervasive flow control would result in the type of balkanization the Clause is primarily intended to prevent. See *H. P. Hood & Sons,* 336 U. S., at 537–538.

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*Colo. Rev. Stat. § 30–20–107 (Supp. 1993); Conn. Gen. Stat. § 22a–220a (1993); Del. Code Ann., Tit. 7, § 6406(31) (1991); Fla. Stat. § 403.713 (1991); Haw. Rev. Stat. § 340A–3(a) (1985); Ind. Code §§ 36–9–31–3 and –4 (1993); Iowa Code § 28G.4 (1987); La. Rev. Stat. Ann. § 30:2307(9) (West 1989); Me. Rev. Stat. Ann., Tit. 38, § 1304–B(2) (1964); Minn. Stat. § 115A.80 (1992); Miss. Code Ann. § 17–17–319 (Supp. 1993); Mo. Rev. Stat. § 260.202 (Supp. 1993); N. J. Stat. Ann. §§ 13.1E–22, 48:13A–5 (West 1991 and Supp. 1993); N. C. Gen. Stat. § 130A–294 (1992); N. D. Cent. Code §§ 23–29–06(6) and (8) (Supp. 1993); Ore. Rev. Stat. §§ 268.317(3) and (4) (1991); Pa. Stat. Ann., Tit. 53, § 4000.303(e) (Purdon Supp. 1993); R. I. Gen. Laws § 23–19–10(40) (1956); Tenn. Code Ann. § 68–211–814 (Supp. 1993); Vt. Stat. Ann., Tit. 24, § 2203b (1992); Va. Code Ann. § 15.1–28.01 (Supp. 1993).

Given that many jurisdictions are contemplating or enacting flow control, the potential for conflicts is high. For example, in the State of New Jersey, just south of Clarkstown, local waste may be removed from the State for the sorting of recyclables "as long as the residual solid waste is returned to New Jersey." Brief for New Jersey as *Amicus Curiae* 5. Under Local Law 9, however, if petitioners bring waste from New Jersey for recycling at their Clarkstown operation, the residual waste may not be returned to New Jersey, but must be transported to Clarkstown's transfer facility. As a consequence, operations like petitioners' cannot comply with the requirements of both jurisdictions. Nondiscriminatory state or local laws which actually conflict with the enactments of other States are constitutionally infirm if they burden interstate commerce. See *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 526–530 (1959) (unconstitutional for Illinois to require truck mudguards when that requirement conflicts with the requirements of other States); *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U. S. 761, 773–774 (1945) (same). The increasing number of flow control regimes virtually ensures some inconsistency between jurisdictions, with the effect of eliminating the movement of waste between jurisdictions. I therefore conclude that the burden Local Law 9 imposes on interstate commerce is excessive in relation to Clarkstown's interest in ensuring a fixed supply of waste to supply its project.

III

Although this Court can—and often does—enforce the dormant aspect of the Commerce Clause, the Clause is primarily a grant of congressional authority to regulate commerce among the States. *Amicus* National Association of Bond Lawyers (NABL) argues that the flow control ordinance in this case has been authorized by Congress. Given the residual nature of our authority under the Clause, and because the argument that Congress has in fact authorized flow control is substantial, I think it appropriate to address it directly.

Congress must be "unmistakably clear" before we will conclude that it intended to permit state regulation which would otherwise violate the dormant Commerce Clause. *South-Central Timber,* 467 U. S., at 91 (plurality opinion). See also *Sporhase* v. *Nebraska ex rel. Douglas,* 458 U. S. 941, 960 (1982) (finding consent only where "Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated") (citations and internal quotation marks omitted). The State or locality has the burden of demonstrating this intent. *Wyoming* v. *Oklahoma,* 502 U. S., at 458.

Amicus NABL argues that Subchapter IV of the Resource Conservation and Recovery Act of 1976 (RCRA), 90 Stat. 2813, as amended, 42 U. S. C. § 6941 *et seq.,* and its amendments, remove the constitutional constraints on local implementation of flow control. RCRA is a sweeping statute intended to regulate solid waste from cradle to grave. In addition to providing specific federal standards for the management of solid waste, RCRA Subchapter IV governs "State or Regional Solid Waste Plans." Among the objectives of the subchapter is to "assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound"; this is to be accomplished by federal "assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines." § 6941.

Under RCRA, States are to submit solid waste management plans that "prohibit the establishment of new open dumps within the State," and ensure that solid waste will be "utilized for resource recovery or . . . disposed of in sanitary landfills . . . or otherwise disposed of in an environmentally sound manner." § 6943(a)(2). The plans must also ensure that state and local governments not be "prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities [or] from entering into long-term contracts for the operation of such facilities." § 6943(a)(5).

Amicus also points to a statement in a House Report addressing § 6943(a)(5), a statement evincing some concern with flow control:

> "This prohibition [on state or local laws prohibiting long-term contracts] is not to be construed to affect state planning *which may require all discarded materials to be transported to a particular location. . . .*" H. R. Rep. No. 94–1491, p. 34 (1976) (emphasis added).

Finally, in the Solid Waste Disposal Act Amendments of 1980, Congress authorized the Environmental Protection Agency (EPA) to "provide technical assistance to States [and local governments] to assist in the removal or modification of legal, institutional, and economic impediments which have the effect of impeding the development of systems and facilities [for resource recovery]." § 6948(d)(3). Among the obstacles to effective resource recovery are "impediments to institutional arrangements necessary to undertake projects . . . *including the creation of special districts, authorities, or corporations where necessary having the power to secure the supply of waste of a project.*" § 6948(d)(3)(C) (emphasis added).

I agree with *amicus* NABL that these references indicate that Congress expected local governments to implement some form of flow control. Nonetheless, they neither individually nor cumulatively rise to the level of the "explicit" authorization required by our dormant Commerce Clause decisions. First, the primary focus of the references is on legal impediments imposed as a result of state—not federal—law. In addition, the reference to local authority to "secure the supply of waste" is contained in § 6948(d)(3)(C), which is a delegation not to the States but to *EPA* of authority to assist local government in solving waste supply problems. EPA has stated in its implementing regulations that the "State plan should provide for substate cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries." 40 CFR § 256.42(h) (1993). And while the House Report seems to contemplate that municipalities may require waste to be brought to a particular location, this stronger language is not reflected in the text of the statute. Cf. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 37 (1992) (for waiver of sovereign immunity, "[i]f clarity does not exist [in the text], it cannot be supplied by a committee report"); *Dellmuth* v. *Muth*, 491 U. S. 223, 230 (1989) (same). In short, these isolated references do not satisfy our requirement of an explicit statutory authorization.

It is within Congress' power to authorize local imposition of flow control. Should Congress revisit this area, and enact legislation providing a clear indication that it intends States and localities to implement flow control, we will, of course, defer to that legislative judgment. Until then, however, Local Law 9 cannot survive constitutional scrutiny. Accordingly, I concur in the judgment of the Court.

JUSTICE SOUTER, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting.

The majority may invoke "well-settled principles of our Commerce Clause jurisprudence," *ante*, at 386, but it does so to strike down an ordinance unlike anything this Court has ever invalidated. Previous cases have held that the "negative" or "dormant" aspect of the Commerce Clause renders state or local legislation unconstitutional when it discriminates against out-of-state or out-of-town businesses such as those that pasteurize milk, hull shrimp, or mill lumber, and the majority relies on these cases because of what they have in common with this one: out-of-state processors are excluded from the local market (here, from the market for trash processing services). What the majority ignores, however, are the differences between our local processing cases and this one: the exclusion worked by Clarkstown's Local Law 9 bestows no benefit on a class of local private actors, but instead directly aids the government in satisfying a traditional governmental responsibility. The law does not differentiate between all local and all out-of-town providers of a service, but instead between the one entity responsible for ensuring that the job gets done and all other enterprises, regardless of their location. The ordinance thus falls outside that class of tariff or protectionist measures that the Commerce Clause has traditionally been thought to bar States from enacting against each other, and when the majority subsumes the ordinance within the class of laws this Court has struck down as facially discriminatory (and so avails itself of our "virtually *per se* rule" against such statutes, see *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978)), the majority is in fact greatly extending the Clause's dormant reach.

There are, however, good and sufficient reasons against expanding the Commerce Clause's inherent capacity to trump exercises of state authority such as the ordinance at issue here. There is no indication in the record that any out-of-state trash processor has been harmed, or that the interstate movement or disposition of trash will be affected one whit. To the degree Local Law 9 affects the market for trash processing services, it does so only by subjecting Clarkstown residents and businesses to burdens far different from the burdens of local favoritism that dormant Commerce Clause jurisprudence seeks to root out. The town has found a way to finance a public improvement, not by transferring its cost to out-of-state economic interests, but by spreading it among the local generators of trash, an equitable result with tendencies that should not disturb the Commerce Clause and should not be disturbed by us.

I

Prior to the 1970's, getting rid of the trash in Clarkstown was just a matter of taking it to the local dump. But over the course of that decade, state regulators cited the town for dumping in violation of environmental laws, and in August 1989 the town entered into a consent decree with the New York State Department of Environmental Conservation, promising to close the landfill, clean up the environmental damage, and make new arrangements to dispose of the town's solid waste. Clarkstown agreed to build a "transfer station" where the town's trash would be brought for sorting out recyclable material and baling the nonrecyclable residue for loading into long-haul trucks bound for out-of-state disposal sites.

Instead of building the transfer station itself, Clarkstown contracted with a private company to build the station and run it for five years, after which the town could buy it for $1. The town based the size of the facility on its best estimate of the amount of trash local residents would generate and undertook to deliver that amount to the transfer station each year, or to pay a substantial penalty to compensate for any shortfall. This "put or pay" contract, together with the right to charge an $81 "tipping" fee for each ton of waste collected at the transfer station, was meant to assure the company its return on investment.

Local Law 9, the ordinance at issue here, is an integral part of this financing scheme. It prohibits individual trash generators within the town from evading payment of the $81 tipping fee by requiring that all residential, commercial, and industrial waste generated or collected within the town be delivered to the transfer station. While Clarkstown residents may dump their waste at another locally licensed recycling center, once such a private recycler culls out the recyclable materials, it must dispose of any residue the same way other Clarkstown residents do, by taking it to the town's transfer station. Local Law 9, §§ 3.C, 3.D (1990).[1] If out-of-towners wish to dispose of their waste in Clarkstown or recycle it there, they enter the town subject to the same restrictions as Clarkstown residents, in being required to use only the town-operated transfer station or a licensed recycling center. § 5.A.

Petitioner C & A Carbone, Inc., operated a recycling center in Clarkstown, according to a state permit authorizing it to collect waste, separate out the recyclables for sale, and dispose of the rest. In violation of Local Law 9, Carbone failed to bring this nonrecyclable residue to the town transfer station, but took it directly to out-of-state incinerators and landfills, including some of the very same ones to which the Clarkstown transfer station sends its trash. Apparently, Carbone bypassed the Clarkstown facility on account of the $81 tipping fee, saving Carbone money, but costing the town thousands in lost revenue daily. In this resulting legal action, Carbone's complaint is one that any Clarkstown trash generator could have made: the town has created a monopoly on trash processing services, and residents are no longer free to provide these services for themselves or to contract for them with others at a mutually agreeable price.

II

We are not called upon to judge the ultimate wisdom of creating this local monopoly, but we are asked to say whether Clarkstown's monopoly violates the Commerce Clause, as long read by this Court to limit the power of state and local governments to discriminate against interstate commerce:

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[1] The ordinance has exceptions not at issue here for hazardous waste, pathological waste, and sludge, and for source-separated recyclables, which can be disposed of within or outside the town. Local Law 9, §§ 1, 3.C (1990).

> "[The] 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down, unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269, 273–274 (1988) (citations omitted).

This limitation on the state and local power has been seen implicit in the Commerce Clause because, as the majority recognizes, the Framers sought to dampen regional jealousies in general and, in particular, to eliminate retaliatory tariffs, which had poisoned commercial relations under the Articles of Confederation. *Ante,* at 390. Laws that hoard for local businesses the right to serve local markets or develop local resources work to isolate States from each other and to incite retaliation, since no State would stand by while another advanced the economic interests of its own business classes at the expense of its neighbors.

A

The majority argues that resolution of the issue before us is controlled by a line of cases in which we have struck down state or local laws that discriminate against out-of-state or out-of-town providers of processing services. See *ante,* at 391–392. With perhaps one exception,[2] the laws invalidated in those cases were patently discriminatory, differentiating by their very terms between in-state and out-of-state (or local and nonlocal) processors. One ordinance, for example, forbad selling pasteurized milk " 'unless the same shall have been pasteurized and bottled . . . within a radius of five miles from the central portion of the City of Madison . . . .' "[3] *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 350, n. 1 (1951) (quoting General Ordinances of the City of Madison § 7.21 (1949)). The other laws expressly discriminated against commerce crossing state lines, placing these local processing cases squarely within the larger class of cases in which this Court has invalidated facially discriminatory legislation.[4]

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[2] The arguable exception is *Pike* v. *Bruce Church, Inc.,* 397 U. S. 137 (1970), where the Court invalidated an administrative order issued pursuant to a facially neutral statute. While the order discriminated on its face, prohibiting the interstate shipment of respondent's cantaloupes unless they were first packaged locally, the statute it sought to enforce merely required that Arizona-grown cantaloupes advertise their State of origin on each package. In Part III, I discuss the line of cases in which we have struck down statutes that, although lacking explicit geographical sorting mechanisms, are discriminatory in practical effect.

As the majority recognizes, Local Law 9 shares two features with these local processing cases. It regulates a processing service available in interstate commerce, *i. e.,* the sorting and baling of solid waste for disposal. And it does so in a fashion that excludes out-of-town trash processors by its very terms. These parallels between Local Law 9 and the statutes previously invalidated confer initial plausibility on the majority's classification of this case with those earlier ones on processing, and they even bring this one within the most general language of some of the earlier cases, abhorring the tendency of such statutes "to impose an artificial rigidity on the economic pattern of the industry," *Toomer* v. *Witsell*, 334 U. S. 385, 403–404 (1948).

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[3] The area encompassed by this provision included all of Madison except the runways of the municipal airport, plus a small amount of unincorporated land. See The Madison and Wisconsin Foundation, Map of the City of Madison (1951).

[4] See, *e. g., Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334 (1992) (Alabama statute taxing hazardous waste not originating in State); *Wyoming* v. *Oklahoma,* 502 U. S. 437 (1992) (Oklahoma statute requiring power plants to burn at least 10 percent Oklahoma-mined coal); *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269 (1988) (Ohio statute awarding tax credit for sales of ethanol only if it is produced in Ohio or in a State that awards similar tax breaks for Ohio-produced ethanol); *New England Power Co.* v. *New Hampshire,* 455 U. S. 331 (1982) (New Hampshire statute prohibiting hydroelectric power from being sold out of State without permission from the State's Public Utilities Commission); *Hughes* v. *Oklahoma,* 441 U. S. 322 (1979) (Oklahoma law forbidding out-of-state sale of natural minnows).

B

There are, however, both analytical and practical differences between this and the earlier processing cases, differences the majority underestimates or overlooks but which, if given their due, should prevent this case from being decided the same way. First, the terms of Clarkstown's ordinance favor a single processor, not the class of all such businesses located in Clarkstown. Second, the one proprietor so favored is essentially an agent of the municipal government, which (unlike Carbone or other private trash processors) must ensure the removal of waste according to acceptable standards of public health. Any discrimination worked by Local Law 9 thus fails to produce the sort of entrepreneurial favoritism we have previously defined and condemned as protectionist.

1

The outstanding feature of the statutes or ordinances reviewed in the local processing cases is their distinction between two classes of private economic actors according to location, favoring shrimp hullers within Louisiana, milk pasteurizers within five miles of the center of Madison, and so on. See *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928); *Dean Milk Co.* v. *Madison, supra.* Since nothing in these local processing laws prevented a proliferation of local businesses within the State or town, the out-of-town processors were not excluded as part and parcel of a general exclusion of private firms from the market, but as a result of discrimination among such firms according to geography alone. It was because of that discrimination in favor of local businesses, preferred at the expense of their out-of-town or out-of-state competitors, that the Court struck down those local processing laws[5] as classic examples of the economic protectionism the dormant Commerce Clause jurisprudence aims to prevent. In the words of one commentator summarizing our case law, it is laws "adopted for the purpose of improving the competitive position of local economic actors, just because they are local, vis-à-vis their foreign competitors" that offend the Commerce Clause. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1138 (1986). The Commerce Clause does not otherwise protect access to local markets. *Id.*, at 1128.[6]

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[5] See *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 92 (1984) (quoting *South Carolina Highway Dept.* v. *Barnwell Brothers, Inc.*, 303 U. S. 177, 185, n. 2 (1938)) (danger lies in regulation whose "'burden falls principally upon those without the state'"); *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354 (1951) (in "erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do . . ."); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1, 13 (1928) (statute unconstitutional because it "favor[s] the canning of the meat and the manufacture of bran in Louisiana" instead of Biloxi); *Minnesota* v. *Barber*, 136 U. S. 313, 323 (1890) (statute infirm because its necessary result is "discrimination against the products and business of other States in favor of the products and business of Minnesota"). See also *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources*, 504 U. S. 353, 361 (1992) (statute infirm because it protects "local waste producers . . . from competition from out-of-state waste producers who seek to use local waste disposal areas"); *Philadelphia* v. *New Jersey*, 437 U. S. 617, 626–627 (1978) (New Jersey "may not . . . discriminat[e] against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently").

[6] See also Smith, State Discriminations Against Interstate Commerce, 74 Calif. L. Rev. 1203, 1204, 1213 (1986) ("The nub of the matter is that discriminatory regulations are almost invariably invalid, whereas nondiscriminatory regulations are much more likely to survive"; "[a] regulation is discriminatory if it imposes greater economic burdens on those outside the state, to the economic advantage of those within"); L. Tribe, American Constitutional Law 417 (2d ed. 1988) ("[T]he negative implications of the commerce clause derive principally from a *political* theory of union, not

The majority recognizes, but discounts, this difference between laws favoring all local actors and this law favoring a single municipal one. According to the majority, "this difference just makes the protectionist effect of the ordinance more acute" because outside investors cannot even build competing facilities within Clarkstown. *Ante,* at 392. But of course Clarkstown investors face the same prohibition, which is to say that Local Law 9's exclusion of outside capital is part of a broader exclusion of private capital, not a discrimination against out-of-state investors as such.[7] Cf. *Lewis* v. *BT Investment Managers, Inc.,* 447 U. S. 27 (1980) (striking down statute prohibiting businesses owned by out-of-state banks, bank holding companies, or trust companies from providing investment advisory services). Thus, while these differences may underscore the ordinance's anticompetitive effect, they substantially mitigate any protectionist effect, for subjecting out-of-town investors and facilities to the same constraints as local ones is not economic protectionism. See *New Energy Co. of Ind.* v. *Limbach,* 486 U. S., at 273–274.[8]

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from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency").

[7] The record does not indicate whether local or out-of-state investors own the private firm that built Clarkstown's transfer station for the municipality.

[8] In a potentially related argument, the majority says our case law supports the proposition that an "ordinance is no less discriminatory because in-state or in-town processors are also covered by [its] prohibition." *Ante,* at 391. If this statement is understood as doing away with the distinction between laws that discriminate based on geography and those that do not, authority for it is lacking. The majority supports its statement by citing from a footnote in *Dean Milk,* that "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce," 340 U. S., at 354, n. 4, but that observation merely recognized that our dormant Commerce Clause jurisprudence extends to municipalities as well as to States and invalidates geographical restrictions phrased in miles as well as in terms of political boundaries. This reading is confirmed by the fact that the

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Nor is the monopolist created by Local Law 9 just another private company successfully enlisting local government to protect the jobs and profits of local citizens. While our previous local processing cases have barred discrimination in markets served by private companies, Clarkstown's transfer station is essentially a municipal facility, built and operated under a contract with the municipality and soon to revert entirely to municipal ownership.[9] This, of course, is no mere coincidence, since the facility performs a municipal function that tradition as well as state and federal law recognize as the domain of local government. Throughout the history of this country, municipalities have taken responsibility for disposing of local garbage to prevent noisome smells, obstruction of the streets, and threats to public health,[10] and today

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Dean Milk Court's only explanation for its statement was to cite a case striking down a statute forbidding the selling of "'any fresh meats . . . slaughtered one hundred miles or over from the place at which it is offered for sale, until and except it has been inspected'" at a cost to its owner of a penny per pound. *Brimmer* v. *Rebman*, 138 U. S. 78, 80 (1891) (quoting Acts of Va. 1889–1890, p. 63, ch. 80). That the majority here cites also to *Fort Gratiot Landfill* v. *Michigan Dept. of Natural Resources*, *supra*, may indicate that it reads *Dean Milk* the same way I do, but then it cannot use the case to stand for the more radical proposition I quoted above.

[9] At the end of a 5-year term, during which the private contractor receives profits sufficient to induce it to provide the plant in the first place, the town will presumably step into the contractor's shoes for the nominal dollar. Such contracts, enlisting a private company to build, operate, and then transfer to local government an expensive public improvement, enable municipalities to acquire public facilities without resorting to municipal funds or credit.

[10] For example, in 1764 the South Carolina Legislature established a street commission for Charleston with the power "to remove all filth and rubbish, to such proper place or places, in or near the said town, as they . . . shall allot . . . ." Act of Aug. 10, 1764, ¶ 1. In New Amsterdam a century earlier, "[t]he burgomasters and *schepens* ordained that all such refuse be brought to dumping-grounds near the City Hall and the gallows

78 percent of landfills receiving municipal solid waste are owned by local governments. See U. S. Environmental Protection Agency, Resource Conservation and Recovery Act, Subtitle D Study: Phase 1 Report, p. 4–7 (Oct. 1986) (Table 4–2). The National Government provides "technical and financial assistance to States or regional authorities for comprehensive planning" with regard to the disposal of solid waste, 42 U. S. C. § 6941, and the State of New York authorizes local governments to prepare such management plans for the proper disposal of all solid waste generated within their jurisdictions, N. Y. Envir. Conserv. Law § 27–0107 (McKinney Supp. 1994). These general provisions underlie Clarkstown's more specific obligation (under its consent decree with the New York State Department of Environmental Conservation) to establish a transfer station in place of the old town dump, and it is to finance this transfer station that Local Law 9 was passed.

The majority ignores this distinction between public and private enterprise, equating Local Law 9's "hoard[ing]" of solid waste for the municipal transfer station with the design and effect of ordinances that restrict access to local markets for the benefit of local private firms. *Ante,* at 392. But private businesses, whether local or out of State, first serve the

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nor to other designated places." M. Goodwin, Dutch and English on the Hudson 105 (1977 ed.).

Indeed, some communities have employed flow control ordinances in pursuit of these goals, ordinances this Court has twice upheld against constitutional attack. See *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U. S. 306 (1905) (upholding against a takings challenge an ordinance requiring that all garbage in San Francisco be disposed of, for a fee, at facilities belonging to F. E. Sharon); *Gardner* v. *Michigan,* 199 U. S. 325 (1905) (upholding against due process challenge an ordinance requiring that all garbage in Detroit be collected and disposed of by a single city contractor). It is not mere inattention that has left these fine old cases free from subsequent aspersion, for they illustrate that even at the height of the *Lochner* era the Court recognized that for municipalities struggling to abate their garbage problems, the Constitution did not require unimpeded private enterprise.

private interests of their owners, and there is therefore only rarely a reason other than economic protectionism for favoring local businesses over their out-of-town competitors. The local government itself occupies a very different market position, however, being the one entity that enters the market to serve the public interest of local citizens quite apart from private interest in private gain. Reasons other than economic protectionism are accordingly more likely to explain the design and effect of an ordinance that favors a public facility. The facility as constructed might, for example, be one that private economic actors, left to their own devices, would not have built, but which the locality needs in order to abate (or guarantee against creating) a public nuisance. There is some evidence in this case that this is so, as the New York State Department of Environmental Conservation would have had no reason to insist that Clarkstown build its own transfer station if the private market had furnished adequate processing capacity to meet Clarkstown's needs. An ordinance that favors a municipal facility, in any event, is one that favors the public sector, and if "we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position," *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U. S. 528, 556 (1985), then surely this Court's dormant Commerce Clause jurisprudence must itself see that favoring state-sponsored facilities differs from discriminating among private economic actors, and is much less likely to be protectionist.

3

Having established that Local Law 9 does not serve the competitive class identified in previous local processing cases and that Clarkstown differs correspondingly from other local processors, we must ask whether these differences justify a standard of dormant Commerce Clause review that differs from the virtually fatal scrutiny imposed in those earlier cases. I believe they do.

The justification for subjecting the local processing laws and the broader class of clearly discriminatory commercial regulation to near-fatal scrutiny is the virtual certainty that such laws, at least in their discriminatory aspect, serve no legitimate, nonprotectionist purpose. See *Philadelphia* v. *New Jersey*, 437 U. S., at 624 ("[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected").[11] Whether we find "the evil of protectionism," *id.*, at 626, in the clear import of specific statutory provisions or in the legislature's ultimate purpose, the discriminatory scheme is almost always designed either to favor local industry, as such, or to achieve some other goal while exporting a disproportionate share of the burden of attaining it, which is merely a subtler form of local favoritism, *id.*, at 626–628.

On the other hand, in a market served by a municipal facility, a law that favors that single facility over all others is a law that favors the public sector over all private-sector processors, whether local or out of State. Because the favor does not go to local private competitors of out-of-state firms, out-of-state governments will at the least lack a motive to favor their own firms in order to equalize the positions of private competitors. While a preference in favor of the government may incidentally function as local favoritism as well, a more particularized enquiry is necessary before a court can say whether such a law does in fact smack too strongly of economic protectionism. If Local Law 9 is to be struck down, in other words, it must be under that test most readily identified with *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970).

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[11] For the rare occasion when discriminatory laws are the best vehicle for furthering a legitimate state interest, *Maine* v. *Taylor*, 477 U. S. 131 (1986), provides an exception, but we need not address that exception here because this ordinance is not subject to the presumption of unconstitutionality appropriate for protectionist legislation.

III

We have said that when legislation that does not facially discriminate "comes into conflict with the Commerce Clause's overriding requirement of a national 'common market,' we are confronted with the task of effecting an accommodation of the competing national and local interests." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333, 350 (1977). Although this analysis of competing interests has sometimes been called a "balancing test," it is not so much an open-ended weighing of an ordinance's pros and cons, as an assessment of whether an ordinance discriminates in practice or otherwise unjustifiably operates to isolate a State's economy from the national common market. If a statute or local ordinance serves a legitimate local interest and does not patently discriminate, "it will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike* v. *Bruce Church, Inc., supra*, at 142. The analysis is similar to, but softer around the edges than,[12] the test we employ in cases of overt discrimination. "[T]he question becomes one of degree," and its answer depends on the nature of the burden on interstate commerce, the nature of the local interest, and the availability of alternative methods for advancing the local interest without hindering the national one. 397 U. S., at 142, 145.

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[12] Where discrimination is not patent on the face of a statute, the party challenging its constitutionality has a more difficult task, but appropriately so because the danger posed by such laws is generally smaller. Discrimination that is not patent or purposeful "in effect may be substantially less likely to provoke retaliation by other states . . . . In the words of Justice Holmes, 'even a dog distinguishes between being stumbled over and being kicked.'" Smith, 74 Calif. L. Rev., at 1251 (quoting O. W. Holmes, The Common Law 3 (1881)). See also Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1133–1134 (1986).

The primary burden Carbone attributes to flow control ordinances such as Local Law 9 is that they "prevent trash from being sent to the most cost-effective disposal facilities, and insulate the designated facility from all price competition." Brief for Petitioners 32. In this case, customers must pay $11 per ton more for dumping trash at the Clarkstown transfer station than they would pay at Carbone's facility, although this dollar figure presumably overstates the burden by disguising some differences between the two: according to its state permit, 90 percent of Carbone's waste stream comprises recyclable cardboard, while the Clarkstown facility takes all manner of less valuable waste, which it treats with state-of-the-art environmental technology not employed at Carbone's more rudimentary plant.

Fortunately, the dollar cost of the burden need not be pinpointed, its nature being more significant than its economic extent. When we look to its nature, it should be clear that the monopolistic character of Local Law 9's effects is not itself suspicious for purposes of the Commerce Clause. Although the right to compete is a hallmark of the American economy and local monopolies are subject to challenge under the century-old Sherman Act,[13] the bar to monopolies (or, rather, the authority to dismember and penalize them) arises from a statutory, not a constitutional, mandate. No more than the Fourteenth Amendment, the Commerce Clause "does not enact Mr. Herbert Spencer's Social Statics . . . [or]

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[13] See 15 U. S. C. §§ 1 and 2. Indeed, other flow control ordinances have been challenged under the Sherman Act, although without success where municipal defendants have availed themselves of the state action exception to the antitrust laws. See *Hybud Equipment Corp.* v. *Akron*, 742 F. 2d 949 (CA6 1984); *Central Iowa Refuse Systems, Inc.* v. *Des Moines Metropolitan Solid Waste Agency*, 715 F. 2d 419 (CA8 1983). That the State of New York's Holland-Gromack Law, 1991 N. Y. Laws, ch. 569 (McKinney), authorizes Clarkstown's flow control ordinance may explain why no Sherman Act claim was made here.

embody a particular economic theory, whether of paternalism . . . or of *laissez faire*." *Lochner* v. *New York*, 198 U. S. 45, 75 (1905) (Holmes, J., dissenting). The dormant Commerce Clause does not "protec[t] the particular structure or methods of operation in a[ny] . . . market." *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 127 (1978). The only right to compete that it protects is the right to compete on terms independent of one's location.

While the monopolistic nature of the burden may be disregarded, any geographically discriminatory elements must be assessed with care. We have already observed that there is no geographically based selection among private firms, and it is clear from the face of the ordinance that nothing hinges on the source of trash that enters Clarkstown or upon the destination of the processed waste that leaves the transfer station. There is, to be sure, an incidental local economic benefit, for the need to process Clarkstown's trash in Clarkstown will create local jobs. But this local boon is mitigated by another feature of the ordinance, in that it finances whatever benefits it confers on the town from the pockets of the very citizens who passed it into law. On the reasonable assumption that no one can avoid producing some trash, every resident of Clarkstown must bear a portion of the burden Local Law 9 imposes to support the municipal monopoly, an uncharacteristic feature of statutes claimed to violate the Commerce Clause.

By way of contrast, most of the local processing statutes we have previously invalidated imposed requirements that made local goods more expensive as they headed into the national market, so that out-of-state economies bore the bulk of any burden. Requiring that Alaskan timber be milled in that State prior to export would add the value of the milling service to the Alaskan economy at the expense of some other State, but would not burden the Alaskans who adopted such a law. Cf. *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 92 (1984). Similarly, South Carolinians would retain the financial benefit of a local processing requirement for shrimp without paying anything more themselves. Cf. *Toomer* v. *Witsell,* 334 U. S., at 403.[14] And in *Philadelphia* v. *New Jersey,* 437 U. S., at 628, the State attempted to export the burden of conserving its scarce landfill space by barring the importation of out-of-state waste. See also *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority,* 476 U. S. 573, 580 (1986) (price reduction for in-state consumers of alcoholic beverages procured at the expense of out-of-state consumers). Courts step in through the dormant Commerce Clause to prevent such exports because legislative action imposing a burden "'principally upon those without the state . . . is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.'" *South-Central Timber, supra,* at 92 (quoting *South Carolina Highway Dept.* v. *Barnwell Brothers, Inc.,* 303 U. S. 177, 185, n. 2 (1938)); see also *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U. S. 761, 767–768, n. 2 (1945). Here, in contrast, every voter in Clarkstown pays to fund the benefits of flow control, however high the tipping fee is set. Since, indeed, the mandate to use the town facility will only make a difference when the tipping fee raises the cost of using the facility above what the market would otherwise set, the Clarkstown voters are funding their benefit by assessing themselves and paying an economic penalty. Any whiff of economic protectionism is far from obvious.[15]

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[14] I recognize that the economics differ if a State does not enjoy a significant price advantage over its neighbors and thus cannot pass along the added costs associated with its local processing requirement, but such States are unlikely to adopt local processing requirements for precisely that reason.

[15] This argument does not alone foreclose the possibility of economic protectionism in this case, as the ordinance could burden, in addition to the residents of Clarkstown, out-of-town trash processors who would have sought Clarkstown's business in the absence of flow control. But as we

An examination of the record confirms skepticism that enforcement of the ordinance portends a Commerce Clause violation, for it shows that the burden falls entirely on Clarkstown residents. If the record contained evidence that Clarkstown's ordinance burdened out-of-town providers of garbage sorting and baling services, rather than just the local business that is a party in this case, that fact might be significant. But petitioners have presented no evidence that there are transfer stations outside Clarkstown capable of handling the town's business, and the record is devoid of evidence that such enterprises have lost business as a result of this ordinance. Cf. *Pike* v. *Bruce Church, Inc.*, 397 U. S., at 145 ("The nature of th[e] burden is, constitutionally, more significant than its extent" and the danger to be avoided is that of laws that hoard business for local residents). Similarly, if the record supported an inference that above-market pricing at the Clarkstown transfer station caused less trash to flow to out-of-state landfills and incinerators, that, too, might have constitutional significance. There is, however, no evidence of any disruption in the flow of trash from curbsides in Clarkstown to landfills in Florida and Ohio.[16] Here

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will see, the absence of evidence of injury to such processors eliminates that argument here.

[16] In this context, note that the conflict JUSTICE O'CONNOR hypothesizes between multiple flow-control laws is not one that occurs in this case. If Carbone was processing trash from New Jersey, it was making no attempt to return the nonrecycled residue there. And theoretically, Carbone could have complied with both flow control ordinances, as Clarkstown's law required local processing, while New Jersey's required only that any postprocessing residue be returned to the State. But more fundamentally, even if a nondiscriminatory ordinance conflicts with the law of some other jurisdiction, that fact would not, in itself, lead to its invalidation. In the cases JUSTICE O'CONNOR cites, the statutes at issue served no legitimate state interest that weighed against the burden on interstate commerce their conflicts created. See *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 525 (1959) (mudguards Illinois required on trucks possess no safety advantage but create new hazards); *Southern Pacific Co.* v. *Arizona*

we can confidently say that the only business lost as a result of this ordinance is business lost in Clarkstown, as customers who had used Carbone's facility drift away in response to any higher fees Carbone may have to institute to afford its share of city services; but business lost in Clarkstown as a result of a Clarkstown ordinance is not a burden that offends the Constitution.

This skepticism that protectionism is afoot here is confirmed again when we examine the governmental interests apparently served by the local law. As mentioned already, the State and its municipalities need prompt, sanitary trash processing, which is imperative whether or not the private market sees fit to serve this need at an affordable price and to continue doing so dependably into the future. The state and local governments also have a substantial interest in the flow-control feature to minimize the risk of financing this service, for while there may be an element of exaggeration in the statement that "[r]esource recovery facilities cannot be built unless they are guaranteed a supply of discarded material," H. R. Rep. No. 94–1491, p. 10 (1976), there is no question that a "put or pay" contract of the type Clarkstown signed will be a significant inducement to accept municipal responsibility to guarantee efficiency and sanitation in trash processing. Waste disposal with minimal environmental damage requires serious capital investment, *id.*, at 34, and there are limits on any municipality's ability to incur debt or

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ex rel. Sullivan, 325 U. S. 761, 779 (1945) (Arizona statute limiting length of trains "affords at most slight and dubious advantage, if any" with respect to safety). Here, in contrast, we will see that the municipality's interests are substantial and that the alternative means for advancing them are less desirable and potentially as disruptive of interstate commerce. Finally, in any conflict between flow control that reaches only waste within its jurisdiction and flow control that reaches beyond (requiring waste originating locally to be returned after processing elsewhere), it may be the latter that should give way for regulating conduct occuring wholly out of State. See *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 580–582 (1986).

to finance facilities out of tax revenues. Protection of the public fisc is a legitimate local benefit directly advanced by the ordinance and quite unlike the generalized advantage to local businesses that we have condemned as protectionist in the past. See Regan, 84 Mich. L. Rev., at 1120 ("[R]aising revenue for the state treasury is a federally cognizable benefit"; protectionism is not); cf. *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353, 357 (1992) (law protects private, not publicly owned, waste disposal capacity for domestic use); *Philadelphia* v. *New Jersey,* 437 U. S., at 627, n. 6 (expressing no opinion about State's power to favor its own residents in granting access to state-owned resources).[17]

Moreover, flow control offers an additional benefit that could not be gained by financing through a subsidy derived from general tax revenues, in spreading the cost of the facility among all Clarkstown residents who generate trash. The ordinance does, of course, protect taxpayers, including those who already support the transfer station by patronizing it, from ending up with the tab for making provision for large-volume trash producers like Carbone, who would rely on the municipal facility when that was advantageous but opt out whenever the transfer station's price rose above the market price. In proportioning each resident's burden to the amount of trash generated, the ordinance has the added virtue of providing a direct and measurable deterrent to the generation of unnecessary waste in the first place. And in any event it is far from clear that the alternative to flow control (*i. e.,* subsidies from general tax revenues or municipal bonds) would be less disruptive of interstate commerce than flow control, since a subsidized competitor can effectively squelch competition by underbidding it.

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[17] The Court did strike down California's depression-era ban on the "importation" of indigent laborers despite the State's protestations that the statute protected the public fisc from the strain of additional outlays for poor relief, but the Court stressed the statute's direct effect on immigrants instead of relying on any indirect effects on the public purse. See *Edwards* v. *California,* 314 U. S. 160, 174 (1941).

There is, in short, no evidence that Local Law 9 causes discrimination against out-of-town processors, because there is no evidence in the record that such processors have lost business as a result of it. Instead, we know only that the ordinance causes the local residents who adopted it to pay more for trash disposal services. But local burdens are not the focus of the dormant Commerce Clause, and this imposition is in any event readily justified by the ordinance's legitimate benefits in reliable and sanitary trash processing.

* * *

The Commerce Clause was not passed to save the citizens of Clarkstown from themselves. It should not be wielded to prevent them from attacking their local garbage problems with an ordinance that does not discriminate between local and out-of-town participants in the private market for trash disposal services and that is not protectionist in its purpose or effect. Local Law 9 conveys a privilege on the municipal government alone, the only market participant that bears responsibility for ensuring that adequate trash processing services continue to be available to Clarkstown residents. Because the Court's decision today is neither compelled by our local processing cases nor consistent with this Court's reason for inferring a dormant or negative aspect to the Commerce Clause in the first place, I respectfully dissent.

SECURITY SERVICES, INC. *v.* KMART CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93–284. Argued February 28, 1994—Decided May 16, 1994

The mileage rate tariff that petitioner motor carrier filed with the Interstate Commerce Commission (ICC) did not list distances for calculating charges for shipments, but instead relied upon a Household Goods Carriers' Bureau (HGCB) Mileage Guide for its distance component. The Mileage Guide states that it may not be used to determine rates unless the carrier is shown as a "participant" in the Guide. Participants are listed in a separate HGCB tariff filed with the ICC. When petitioner failed to pay its fees, HGCB canceled petitioner's participation by supplementing the latter tariff. Sometime later, petitioner contracted to transport respondent shipper's goods at rates below its filed tariff rates. Petitioner subsequently filed for Chapter 11 bankruptcy and, as debtor-in-possession, asserted that respondent was liable under the Interstate Commerce Act's filed rate doctrine for undercharges based on the difference between the contract and tariff rates. Respondent refused to pay. Petitioner sued. The District Court granted summary judgment for respondent, and the Court of Appeals affirmed, concluding that the filed tariff could not support an undercharge claim because it was void under ICC regulations requiring participation in mileage guides referred to in a carrier's tariff; that the regulations' retroactive voiding of the tariff was permissible under *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354; and that nonparticipation in the Guide was not a mere technical defect excused by petitioner's substantial compliance with the filed rate rule.

Held: A motor carrier in bankruptcy may not rely on tariff rates it has filed with the ICC, but which are void for nonparticipation under ICC regulations, as a basis for recovering undercharges. Pp. 435–444.

(a) A bankruptcy trustee for a defunct carrier or the carrier itself as a debtor-in-possession is entitled to rely on the filed rate doctrine, which mandates that carriers charge and be paid the rates filed in a tariff, to collect for undercharges based on effective, filed rates. *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116. The ICC's void-for-nonparticipation regulation, however, invalidates a mileage-based tariff once cancellation of the carrier's participation in an agent's distance guide is published, as it was here. Such a tariff is incomplete and ceases to satisfy the fundamental purpose of tariffs: to disclose the freight charge due to the carrier. Petitioner may not recover for undercharges based on filed, but void, rates lacking an essential element. Pp. 435–440.

(b) The rule of *American Trucking, supra,* at 361–364, is not apposite here, for the void-for-nonparticipation regulation does not apply retroactively. Under the regulation, petitioner's tariff reference to the HGCB Mileage Guide became void as a matter of law and its tariff filings incomplete on their face when HGCB canceled its participation in the Guide by filing a supplemental tariff. The transactions with respondent occurred after that date. Pp. 440–442.

(c) Also inapplicable is the "technical defect" rule. See, *e. g., Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.,* 235 U. S. 371, 375. A tariff like petitioner's that refers to another tariff for essential information, which tariff in turn states that the carrier may not refer to it, does not provide the "adequate notice" of rates to be charged that the Court's "technical defect" cases require. Pp. 442–443.

996 F. 2d 1516, affirmed.

Souter, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Blackmun, Stevens, O'Connor, Scalia, and Kennedy, JJ., joined. Stevens, J., filed a concurring opinion, *post,* p. 444. Thomas, J., *post,* p. 444, and Ginsburg, J., *post,* p. 455, filed dissenting opinions.

Paul O. Taylor argued the cause and filed briefs for petitioner.

William J. Augello argued the cause for respondent. With him on the brief was *Alice I. Buckley.*

John F. Manning argued the cause for the United States et al. as *amici curiae* urging affirmance. On the brief were *Solicitor General Days, Deputy Solicitor General Wallace, Michael R. Dreeben, Henri F. Rush,* and *Ellen D. Hanson.**

**Joseph L. Steinfeld, Jr., Robert B. Walker, John T. Siegler,* and *Scott H. Lyon* filed a brief for Overland Express, Inc., as *amicus curiae* urging reversal.

Frederick L. Wood, Nicholas J. DiMichael, and *Richard D. Fortin* filed a brief for the National Industrial Transportation League as *amicus curiae* urging affirmance.

JUSTICE SOUTER delivered the opinion of the Court.

This case presents the question whether a motor carrier in bankruptcy may recover for undercharges based on tariff rates that are void as a matter of law under the Interstate Commerce Commission's regulations. We hold that the carrier may not rely on the filed but void tariff.

I

On August 20, 1984, petitioner Security Services, Inc., (then known as Riss International Corp.) filed with the Interstate Commerce Commission (Commission or ICC) a mileage (or distance) rate tariff having an effective date 30 days later. The tariff was received, accepted, and filed, and was never rejected by the ICC. Although the tariff specified rates to be charged per mile of carriage, it was not complete in itself, for it included no list of distances or map on which a shipper could rely in calculating charges for a given shipment. For the distance component of this mileage-based tariff, petitioner relied upon a Household Goods Carriers' Bureau (HGCB) Mileage Guide, its supplements, and subsequent issues. HGCB is itself not a carrier, but a publisher of distance guides for use in tariff filings. The Mileage Guide is a 565-page volume of large format, which specifies the distances in miles between various points of origin and destination, and contains maps and supplemental rules. The Mileage Guide refers shippers to a separate HGCB tariff and its supplements, filed with the ICC, for a list of the carriers who are "participants" in the Mileage Guide. A participant is a carrier who pays HGCB a nominal fee and issues it a valid power of attorney. The first page of HGCB's Mileage Guide states that it "MAY NOT BE EMPLOYED BY A CARRIER AS A GOVERNING PUBLICATION FOR THE PURPOSE OF DETERMINING INTERSTATE TRANSPORTATION RATES BASED ON MILEAGE OR DISTANCE, UNLESS CARRIER IS SHOWN AS A PARTICI-

PANT IN THE ABOVE NAMED TARIFF." HGCB, Mileage Guide No. 12, p. 1 (Dec. 1982). HGCB filed a tariff supplement to its Mileage Guide, effective February 19, 1985, listing participants and canceling Riss's participation in the Mileage Guide for failure to pay the nominal participation fee to HGCB. HGCB treats a power of attorney issued to it as void if not renewed by remitting the participation fee within a reasonable time after cancellation. Riss did not renew.

On April 17, 1986, Riss contracted with respondent Kmart Corporation to transport Kmart's goods at rates specified in the contract, and from November 3, 1986, to December 29, 1989, Riss transported goods for Kmart under the contract. Riss billed, and Kmart paid, at the contract rate. In November 1989, Riss filed a Chapter 11 bankruptcy petition and while undergoing reorganization became Security Services. As debtor-in-possession, Security Services billed Kmart for undercharges (and interest) it was allegedly owed, based on the difference between the contract rate Kmart paid and the tariff rates that Riss assertedly had on file with the ICC. Security Services argued that under the Interstate Commerce Act's filed rate doctrine, Kmart was liable for the tariff rates filed with the ICC, regardless of any contract rate negotiated. Kmart refused to pay, and this suit ensued.

The District Court for the Eastern District of Pennsylvania granted summary judgment for Kmart on the ground that Security Services had no valid tariff on file with the ICC (without which it could not collect for undercharges), because HGCB had canceled its participation in the Mileage Guide. The Court of Appeals for the Third Circuit affirmed. 996 F. 2d 1516 (1993). The court reasoned that under ICC regulations Riss's tariff was void for nonparticipation in the HGCB Mileage Guide, that Riss had not filed any mileages of its own to replace its canceled participation, and that the consequently incomplete and void tariff could not support a claim for undercharges. *Id.*, at 1524. The court took the position that, although the ICC regulations operated retroactively to void a filed tariff, that retroactive application was permissible under this Court's test in *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354 (1984). 996 F. 2d, at 1524–1526. Finally, the court rejected Security Services's argument that its failure to participate formally in the HGCB Mileage Guide was a mere technical defect excused by its substantial compliance with the rule requiring it to file its rates with the Commission. *Id.*, at 1526.

We granted certiorari, 510 U. S. 930 (1993), to resolve a Circuit conflict over the validity of the ICC void-for-nonparticipation regulation,[1] and now affirm.

II

A motor carrier subject to the Interstate Commerce Act must publish its rates in tariffs filed with the ICC. 49 U. S. C. §§ 10761(a), 10762(a)(1). The carrier "may not charge or receive a different compensation for that transportation . . . than the rate specified in the tariff . . . ." § 10761(a). We have held these provisions "to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff." *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 127 (1990); accord, *Reiter* v. *Cooper*, 507 U. S. 258, 266 (1993); *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915) ("Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed"). The purpose of the filed rate doctrine is "to ensure that rates are both reasonable and nondiscriminatory," *Maislin*, *supra*, at 119 (citing 49 U. S. C. §§ 10101(a), 10701(a), 10741(b) (1982 ed.)), and failure to charge or pay the filed rate may result in civil or criminal sanctions. See 49 U. S. C. §§ 11902–11904.

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[1] Compare *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356 (CADC 1993); *Security Services, Inc.* v. *P–Y Transp., Inc.*, 3 F. 3d 966 (CA6 1993); *Brizendine* v. *Cotter & Co.*, 4 F. 3d 457 (CA7 1993), with the decision below, 996 F. 2d 1516 (CA3 1993); see also *Atlantis Express, Inc.* v. *Associated Wholesale Grocers, Inc.*, 989 F. 2d 281 (CA8 1993); *Freightcor Services, Inc.* v. *Vitro Packaging, Inc.*, 969 F. 2d 1563 (CA5 1992), cert. denied, 506 U. S. 1053 (1993).

The ICC has authority to "prescribe the form and manner" of tariff filing, § 10762(b)(1), and the information to be included in tariffs beyond any matter required by statute, § 10762(a)(1). Each carrier is responsible for ensuring that it has rates on file with the ICC. §§ 10702, 10762. Under ICC regulations, a carrier has some choice about the form in which to state its rates, one possibility being a rate based on mileage. A mileage rate has two components: the rate per mile and distances between shipping points. 49 CFR § 1312.30 (1993). A carrier may file the distance portion of the rate by listing in its own tariff the distances between all relevant points, by referring to a map attached to its tariff, or by referring to a separately filed distance guide, such as the HGCB Mileage Guide. § 1312.30(c)(1). Petitioner does not dispute that distance guides are themselves tariffs. Brief for Petitioner 9, n. 4.[2] A carrier may refer to a tariff filed by another carrier or by an agent only by formally "participating" in the referenced tariff, which may be done only by issuing a power of attorney (or concurrence) to the other carrier or agent. 49 CFR §§ 1312.4(d), 1312.10, 1312.27(e) (1993). The Commission's void-for-nonparticipation regulation provides that "a carrier may not participate in a tariff issued in the name of another carrier or an agent unless a power of attorney or concurrence has been executed. Absent effective concurrences or powers of attorney, tariffs are void as a matter of law." § 1312.4(d). Tariff agents like

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[2] *Amicus* Overland Express, Inc., contends that participation in mileage guides is not required, citing *Revision of Tariff Regulations, All Carriers,* 1 I. C. C. 2d 404, 425 (1984). But the ICC has interpreted its rules to require such participation, *Jasper Wyman & Son—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc.,* 8 I. C. C. 2d 246, 249–252 (1992) (applying void-for-nonparticipation regulation), petition for review granted, *Overland Express, Inc.* v. *ICC,* 996 F. 2d 356 (CADC 1993), and its interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation," *Bowles* v. *Seminole Rock & Sand Co.,* 325 U. S. 410, 414 (1945). The ICC's interpretation is neither.

HGCB are required to identify carriers participating in their tariffs, by listing their names either in the tariff containing the mileage guide itself, or in a separate tariff. §§ 1312.13(c), 1312.25. The listings are meant to be kept reasonably current, but are effective until changed. "Revocation or amendment of the power of attorney should be reflected through lawfully published tariff revisions effective concurrently. In the event of failure to so revise the applicable tariff or tariffs, the rates in such tariff or tariffs will remain applicable until lawfully changed." § 1312.10(a). That is, cancellation of a power of attorney (whether by carrier or agent) is accomplished by filing or amending a tariff. §§ 1312.10(a), 1312.25(d), 1312.17(b). Until such filing or amendment, the carrier's reference to the agent's tariff remains effective, § 1312.10(a); once the agent's tariff is filed or amended to note cancellation of the carrier's participation, the carrier's tariff is void as a matter of law (absent additional filing by the carrier). See § 1312.4(d).[3] As the ICC explained, once cancellation of participation is published, as it was here, the mileage-based tariff is incomplete, and "cease[s] to satisfy the fundamental purpose of tariffs; to disclose the freight charges due to the carrier." *Jasper Wyman & Son—Petition for Declaratory Order—Certain Rates and Practices of Overland Express, Inc.*, 8 I. C. C. 2d 246, 258 (1992) (applying void-for-nonparticipation regulation), petition for review granted, *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356 (CADC 1993).

Congress passed the Motor Carrier Act of 1980, 94 Stat. 793, to encourage competition in the industry. In response to this enactment and changes in the carrier market, the ICC simplified its tariff filing rules, as by eliminating the requirement that the actual powers of attorney be filed with the ICC. See 48 Fed. Reg. 31265, 31266 (1983); see also *Revision of Tariff Regulations, All Carriers,* 1 I. C. C. 2d 404, 408 (1984). The ICC's rule that "participation" is required, however, remained in force. See *id.,* at 434; see also 48 Fed. Reg. 31266 (1983) ("The obligation to limit tariff publication to existing agency relationships remains, however, as a matter of law"). Many shippers and carriers nevertheless responded to the very changes in the market that prompted the ICC's revision of its rules by ignoring the rates the carriers had filed with the ICC and instead negotiating rates for carriage lower than the filed rates. As a further result of competitive pressures, many carriers also went bankrupt. A number of trustees and debtors-in-possession then attempted to recover as undercharges the difference between the negotiated and filed rates. Since the market changes convinced the ICC that strict adherence to the filed rate doctrine was no longer necessary under some circumstances, *Maislin,* 497 U. S., at 121, the ICC decided to follow a new policy of determining, case by case, whether it would be an "unreasonable practice" under 49 U. S. C. § 10701 for a carrier (often by then bankrupt) to recover for undercharges from a shipper who had paid a negotiated, rather than filed, rate. See *National Industrial Transportation League—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates,* 3 I. C. C. 2d 99, 104–108 (1986); 5 I. C. C. 2d 623, 628–634 (1989). In *Maislin,* we held that this ICC practice violated the core purposes of the Act, because "[b]y refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent." 497 U. S., at 130 (citing 49 U. S. C. § 10741). Thus, we held that any bankruptcy trustee or debtor-in-possession was entitled to recover for undercharges based on effective, filed rates.

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[3] The ICC has apparently had a similar rule for many decades. In Cancelation of Participation in Agency Tariffs, 4 Fed. Reg. 4440 (1939), the Commission made clear that if an agent in whose tariff a carrier participated canceled the carrier's participation for nonpayment of dues or failure to follow the agent's rules, the carrier could no longer lawfully rely on the agent's tariffs and had to file its own tariffs to comply with the Act.

Petitioner argues that the effect of the void-for-nonparticipation rule is to allow transactions to be governed by secretly negotiated rates, rather than the publicly filed rates mandated by the Act. Petitioner would thus have us see the ICC's recent enforcement of its void-for-nonparticipation regulation as merely an attempt to evade *Maislin* and undermine the filed rate doctrine by keeping trustees or debtors-in-possession from recovering for undercharges.

The argument is an odd one.[4] The filed rate requirement mandates that carriers charge the rates filed in a tariff. We held in *Maislin, supra,* that the requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file. When the carrier's bankruptcy prompted second thoughts about the wisdom of the agreement, the carrier and its creditors obtained the benefit of the requirement. Here, as in *Jasper Wyman, supra,* the carrier seeks to escape its burden by recovering for undercharges even though in effect it had no rates on file because its tariff lacked an essential element. The filed rate rule applied here to bar the carrier's recovery is the same rule that was applied to bar the shipper's defense. Nor is the rule somehow more technical or less equitable when applied against Security Services. It can hardly be gainsaid that a carrier employing distance rates without purporting to be bound by stated distances would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile. While some may debate in other forums about the wisdom of the filed rate doctrine, it is enough to say here that the carriers cannot have it both ways.[5]

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[4] We have no occasion even to reach its factual predicate, which is vigorously disputed. Security Services argues that the agency failed to enforce its regulation from amendment in 1984 until 1993. Petitioner contends that the ICC routinely accepted tariffs containing methods for computing distances that were not authorized by 49 CFR § 1312.30(c) (1993), and that from 1984 to 1988, approximately 40 percent of all motor carriers filing distance rate tariffs referring to HGCB mileage guides did so without formally participating in them. See *Overland Express,* 996 F. 2d, at 359. Petitioner states that the ICC took no action after discovering these failures to participate. The Government argues that the ICC currently enforces its void-for-nonparticipation rule. It represents, for example, that in fiscal year 1993, the ICC "entered 24 consent decrees with carriers who had let their participations in mileage guides and other tariffs lapse, . . . sought and obtained one injunction, and . . . issued an order pursuant to its broad remedial powers" directing carriers who had let their participation in the HGCB lapse either to renew their participation or "strike any reference" to the Mileage Guide in their tariffs. Tr. of Oral Arg. 42. The Government also disputes the assertion that 40 percent of carriers referring to an HGCB guide failed to participate in the guide. The Government and Kmart claim that HGCB found only 111 such failures among the filings of some 12,800 carriers who referred to HGCB guides, and that the ICC has taken action for failure to participate. See *Household Goods Carriers' Bureau, Inc.—Petition for Cancellation of Tariffs of Non-Participating Carriers,* 9 I. C. C. 2d 378 (1993); *National Motor Freight Traffic Assn.—Petition for Cancellation of Tariffs That Refer to the National Motor Freight Classification, but are Filed by or on Behalf of Non-Participating Carriers,* 9 I. C. C. 2d 186 (1992).

III

Petitioner is left to invoke the limitations on the ICC's authority to declare a rate void retroactively, and the "technical defect" rule.[6] Neither is availing.

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[5] Both JUSTICE THOMAS, *post,* at 451, and n. 3, and JUSTICE GINSBURG, *post,* at 457–458, argue that the effect of today's ruling is to validate secretly negotiated rates. Indeed, JUSTICE THOMAS goes so far as to suggest that our opinion would allow the ICC to circumvent *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.,* 497 U. S. 116 (1990), merely by declaring that a filed rate is void whenever another rate is negotiated, *post,* at 455. But our opinion does nothing of the kind. The Interstate Commerce Act states that carriers may provide transportation "only if the rate for the transportation or service is contained in a tariff that is in effect" under the provisions of the Act, 49 U. S. C. § 10761(a), and the Act provides for civil and criminal penalties for failure to maintain such rates, and to charge or pay them. See generally §§ 11901–11904.

[6] JUSTICE THOMAS in dissent argues that we ignore petitioner's "broader argument . . . that the rule is not within the Commission's authority." See *post,* at 453, n. 4. But petitioner's question presented was whether

A

The Court of Appeals believed, 996 F. 2d, at 1524–1526, as petitioner now argues, that the void-for-nonparticipation rule retroactively voids rates and is thus subject to the analysis we applied in *American Trucking,* 467 U. S., at 361–364, 367. See also *Overland Express,* 996 F. 2d, at 360. In *American Trucking,* we held that the Commission could retroactively void effective tariffs *ab initio* only if the action "further[s] a specific statutory mandate of the Commission" and is "directly and closely tied to that mandate." 467 U. S., at 367. But the rule is not apposite here, for the void-for-nonparticipation regulation does not apply retroactively. The ICC did not, as in *American Trucking,* void a rate for a period during which an effective rate was filed. The ICC's regulations operate to void tariffs that would otherwise apply to future transactions, by providing that the rate becomes inapplicable when the tariff reference to the Mileage Guide is canceled, *i. e.,* from the moment at which examination of the tariff filings would show that the carrier's tariff is incomplete, 49 CFR § 1312.10(a) (1993), after which the shipper would be unable to rely on the incomplete tariff to calculate the applicable charges.[7] Transactions occurring before cancellation of the power of attorney are governed by

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"the Interstate Commerce Commission has discretionary authority to retroactively void an effective tariff." Brief for Petitioner i. On the same page cited by JUSTICE THOMAS for petitioner's "broader argument," petitioner in fact describes the ICC rule as "treating [tariffs] as retroactively void," *id.,* at 20, and petitioner concludes the section by arguing that the ICC has no power "to retroactively void effective tariffs." *Id.,* at 24. Petitioner's argument in that section is that the Interstate Commerce Act "prescribes the remedies available to Kmart," *id.,* at 17, not that the regulation is ultra vires. Indeed, at oral argument, counsel for petitioner stated that the ICC's void-for-nonparticipation rule "is authorized. The rule is proper, but the application of the rule . . . is contrary to law." Tr. of Oral Arg. 17.

[7] If a canceled participation is renewed before the effective cancellation date, participation may be restored on five days' notice by filing an amended tariff. 49 CFR § 1312.39(a) (1993).

the filed rate; transactions occurring after cancellation would have no filed mileages to which a carrier's per-mile tariff rates would apply to determine charges due. The regulation does not require any ICC "retroactive rejection" of a filed rate, or indeed any agency action at all. The regulation works like an expiration date on an otherwise valid tariff in voiding its future application, in accordance with § 1312.23(a). Neither regulation works a retroactive voiding. We thus disagree with the Court of Appeals for the District of Columbia Circuit, which held that once a tariff is in effect, a regulation that voids the tariff operates retroactively. *Overland Express, supra,* at 360.

Here, petitioner's tariff reference to the HGCB Mileage Guide became void as a matter of law and its tariff filings incomplete on their face on February 19, 1985, when HGCB canceled its participation in the Mileage Guide by filing a supplemental tariff. The transactions with Kmart occurred after that date.

B

Nor does the "technical defect" rule apply here. Under our cases, neither procedural irregularity nor unreasonableness nullifies a filed rate; the shipper's remedy for irregularity or unreasonable rates is damages. See, *e. g., Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.,* 235 U. S. 371 (1914); *Davis* v. *Portland Seed Co.,* 264 U. S. 403 (1924). In *Berwind-White,* the Court held that filed tariffs falling short of full compliance in stylistic matters were still "adequate to give notice" and so could support a carrier's claim against a shipper for charges due. 235 U. S., at 375. In *Davis,* the effect of applying the carrier's tariff violated a former statutory bar to charging less for a longer distance than for a shorter one over the same route, other things being equal. The Court rejected the position that the higher rate was void and the lower rate legally applicable, so that damages would depend upon the difference between the two, and held that the shipper's remedy was instead to be measured by its actual damages from having been charged the higher rate as compared to a reasonable one. 264 U. S., at 424–426.[8]

Unlike the shippers in the "technical defect" cases, the shipper here could not determine the carrier's rates, since under the regulations, distance tariffs are incomplete once the carrier's participation in the Mileage Guide has been canceled by the agent's filing. See 49 CFR §§ 1312.4(d), 1312.10(a), 1312.30 (1993). We are dealing not with a complete tariff subject to some blemish independently remediable, but with an incomplete tariff insufficient to support a reliable calculation of charges. Security Services, however, questions the distinction by arguing that a shipper is unlikely to search for the list of participating carriers and to determine from the agent's supplemental tariffs that a carrier's participation has been canceled. Rather, a shipper is likely only to follow the reference in the carrier's tariff to the HGCB Mileage Guide, and can fully calculate the applicable charges. But the likelihood or unlikelihood of a shipper's actually reading all the applicable tariffs is simply irrelevant, for carriers and shippers alike are charged with constructive notice of tariff filings, *Kansas City Southern R. Co.* v. *Carl,* 227 U. S. 639, 653 (1913); *Reiter* v. *Cooper,* 507 U. S., at 266, and the fact that shippers may take shortcuts through the filings cannot convert an incomplete tariff into a complete one. In sum, a tariff that refers to another tariff for essential information, which tariff in turn states that the carrier may not refer to it, does not provide the "adequate notice" of rates to be charged that our "technical defect" cases require.

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[8] See also *Texas & Pacific R. Co.* v. *Cisco Oil Mill,* 204 U. S. 449 (1907) (Tariff rates filed with ICC and furnished to freight officers of railroad are legally operative despite railroad's failure to post two copies in each railroad depot); *Genstar Chemical Ltd.* v. *ICC,* 665 F. 2d 1304, 1309 (CADC 1981) ("[T]he 'error' in the tariff was certainly not apparent on its face"), cert. denied, 456 U. S. 905 (1982).

IV

When a carrier relies on a mileage guide filed by another carrier or agent, under ICC regulations the carrier must participate in the guide by maintaining a power of attorney; when a carrier fails to maintain its power of attorney and its participation is canceled by its former agent's filing of an appropriate tariff, the carrier's tariff is void. Trustees in bankruptcy and debtors-in-possession may rely on the filed rate doctrine to collect for undercharges, *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990), but they may not collect for undercharges based on filed, but void, rates. The decision of the Court of Appeals is accordingly

Affirmed.

JUSTICE STEVENS, concurring.

Although I remain convinced that the Court stumbled badly in *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990), when it rejected the sensible construction of the Interstate Commerce Act that had been adopted by six Courts of Appeals and the agency responsible for the Act's enforcement, see *id.*, at 139 (dissenting opinion), I agree with the Court's disposition of this case. I write only to note that both this case and *Maislin* involve a carrier in bankruptcy seeking to enforce a "filed" rate that was higher than the one it negotiated with the shipper; in neither case was there any allegation or evidence that a carrier had violated the "core purposes of the Act" by charging discriminatory rates. See *ante*, at 438; 497 U. S., at 130.

JUSTICE THOMAS, dissenting.

The Court today concludes that the Interstate Commerce Commission has the authority to promulgate regulations under which a carrier's duly filed and effective tariff automatically becomes "void" without "any agency action at all," *ante*, at 442, if the carrier at some time after filing fails to comply with certain requirements of the Commission's regulations. Because I find nothing in the Interstate Commerce Act that expressly or impliedly gives the Commission such authority, I respectfully dissent.

I

The Interstate Commerce Act (Act), 49 U. S. C. § 10101 *et seq.*, requires motor common carriers such as petitioner to publish and file with the Interstate Commerce Commission (Commission or ICC) tariffs containing their rates for transportation or other service under the Commission's jurisdiction, § 10762(a)(1), and forbids them to "charge or receive a different compensation for that transportation or service than the rate specified in the tariff," § 10761(a). In other words, common carriers must charge the filed rate and only the filed rate. This "filed rate doctrine" admits of few exceptions. As we have often stated, "'[d]eviation from [the filed rate] is not permitted upon any pretext. . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress.'" *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116, 127 (1990) (quoting *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U. S. 94, 97 (1915)).

That much is not in dispute. Cf. *ante*, at 435; *post*, at 455. This case turns, not on an application of the filed rate doctrine *per se*, but on the extent of the Commission's authority to determine what rates and tariffs are "filed" or, in the terms of the statute, "in effect." 49 U. S. C. § 10761(a). ICC regulations permit a carrier to file a tariff that incorporates another entity's tariff by reference, provided that the carrier "participates" in that entity's tariff—that is, provided that the carrier maintains an effective concurrence or power of attorney with the publisher of the referenced tariff. See 49 CFR §§ 1312.27(e), 1312.30(c)(4), 1312.4(d) (1993). The regulatory provision at issue here, the so-called "void-for-nonparticipation rule," provides that "[a]bsent effective concurrences or powers of attorney, tariffs are *void as a matter of law.*" § 1312.4(d) (emphasis added).

Taking advantage of the ability to participate in other entities' tariffs, petitioner filed a tariff with the Commission that specified rates per mile for the carriage of various goods and provided that distances would be calculated using a filed tariff (often referred to as a distance guide) of the Household Goods Carriers' Bureau (HGCB). See App. 27. The Commission accepted the tariff for filing, and it became effective. At some point between the effective date of petitioner's tariff and the shipments at issue here, however, petitioner allowed its participation in the HGCB distance guide to lapse. After transporting goods for respondent under a contract that provided for a rate lower than the filed rate, petitioner sought to recover the difference between the filed rate and the contract rate in an action for undercharges. See 49 U. S. C. § 11706(a). The Third Circuit held the filed rate unenforceable because petitioner had failed to maintain its participation in the distance guide; its tariff was void under 49 CFR § 1312.4(d) (1993). See 996 F. 2d 1516, 1524 (1993). Petitioner challenges the Commission's authority to promulgate § 1312.4(d)'s void-for-nonparticipation rule.

II

We considered a similar challenge to the Commission's statutory authority in *ICC* v. *American Trucking Assns., Inc.*, 467 U. S. 354 (1984). At issue there was the Commission's power to reject an effective tariff that had been submitted in substantial violation of a rate-bureau agreement. In determining whether that remedy was within the Commission's authority, we asked two questions: first, whether the Act expressly authorized the agency action in question, see *id.*, at 361–364; and second, if it did not, whether the remedy nevertheless was "direct[ly] adjunct to the Commission's explicit statutory power"—that is, whether it "further[ed] a specific statutory mandate" and was "directly and closely tied to that mandate." *Id.*, at 365, 367 (internal quotation marks omitted). To ascertain whether the void-for-nonparticipation rule is within the Commission's power, we should ask the same questions.

The Court dispenses with the inquiry outlined in *American Trucking,* however, in the belief that the decision applies only to cases involving "retroactiv[e]" action by the Commission. *Ante,* at 440. It is true that in *American Trucking,* the Commission's rejection remedy operated retroactively by voiding the tariff *ab initio.* Thus, unlike the Commission's action in this case, the remedy affected the charges for transportation completed before the rejection took place. The Court, however, misapprehends the scope of our holding. Far from establishing a special test for retroactive Commission actions, *American Trucking* merely applied established principles delimiting the Commission's implied or adjunct powers. Although the retroactive effect of the proposed remedy was relevant to our assessment of the Commission's authority, it did not alter our method of analyzing the statutory challenge to the Commission's power.

Indeed, the decisions upon which we relied in *American Trucking* make clear that the methodology we pursued in that case is not limited to situations involving retroactive agency action. See *American Trucking, supra,* at 365–366 (discussing *Trans Alaska Pipeline Rate Cases,* 436 U. S. 631 (1978), and *United States* v. *Chesapeake & Ohio R. Co.,* 426 U. S. 500 (1976)). Those cases involved "the Commission's efforts to place reasonable conditions on the acceptance of proposed tariffs" as an alternative to suspension of the tariffs pending investigation. 467 U. S., at 365. In *Chesapeake & Ohio,* the Court considered whether conditions imposed on immediate acceptance of a tariff, although not expressly authorized by the Act, were impliedly authorized because they were "directly related to" the Commission's specific statutory mandate to review, and to suspend if necessary, tariff rates when filed. 426 U. S., at 514. Similarly, we held in *Trans Alaska* that, "as in *[Chesapeake & Ohio]*, the . . . conditions [imposed were] a '. . . direct adjunct to the Commission's explicit statutory power to suspend rates pending investigation,' in that they allow[ed] the Commission, in exercising its suspension power, to pursue 'a more measured course' and to 'offe[r] an alternative tailored far more precisely to the particular circumstances' of these cases." 436 U. S., at 655 (quoting *Chesapeake & Ohio*, *supra*, at 514). In both cases, although the actions had only prospective effect, we determined whether they came within the Commission's implied powers by applying essentially the same test that we subsequently applied in *American Trucking* to determine whether the action was within the Commission's implied powers. See 467 U. S., at 367.

III

A

Proceeding with the analysis outlined above, I necessarily begin with the terms of the statute. The Act expressly gives the Commission an "impressive array of prescriptive powers, overcharge assessments, damages remedies, and civil and criminal fines" to enable it to enforce the filing and substantive requirements of the Act. *Id.*, at 379 (O'CONNOR, J., dissenting). See also *id.*, at 359–360. Nowhere, however, does the Act give the Commission authority to render a duly filed and effective tariff void upon noncompliance with a statutory or regulatory requirement.

It might be thought that the most likely source of authority to promulgate the void-for-nonparticipation rule is 49 U. S. C. § 10762(e), which authorizes the Commission to "reject" tariffs. *American Trucking,* however, forecloses reliance on that section. Although § 10762(e) does not by its terms apply only to proposed tariffs, we concluded in *American Trucking* that "unbridled discretion to reject effective tariffs at any time would undermine restraints placed by

Congress on the Commission's power to suspend a proposed tariff." 467 U. S., at 363.[1] We therefore held that § 10762(e) does not apply "to tariffs that have gone into effect." *Id.*, at 362. The critical point for our analysis of the Commission's express authority under the Act was not that the proposed remedy was retroactive, but that it voided an effective tariff. Our holding was premised on recognition that once a tariff becomes effective, the Commission's power to nullify it is limited by the Act.[2] Section 10704(b), for example, "which deals with the Commission's authority to cancel *effective* tariffs," requires a full Commission hearing before action is taken. *Id.*, at 363 (emphasis added). The void-for-nonparticipation rule, which nullifies effective tariffs, provides none of the same procedural protections. Quite the contrary, it obviates the need for "any agency action at all." *Ante*, at 442.

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[1] The Commission may, pending investigation, suspend a "*proposed* rate, classification, rule, or practice at any time for not more than 7 months beyond the time it would otherwise go into effect." 49 U. S. C. § 10708(b) (emphasis added). To do so, the Commission must notify the carrier and file a notice of suspension with the proposed tariff. If the Commission fails to act by the end of the suspension period, the tariff goes into effect. *Ibid.*

[2] The D. C. Circuit has linked this conclusion to the concept of retroactivity. See *Overland Express, Inc.* v. *ICC*, 996 F. 2d 356, 360 (CADC 1993) ("That a tariff was effective or in effect is what makes rejection retroactive"), cert. pending, No. 93–883. Cf. JUSTICE GINSBURG's dissent, *post*, at 457. I agree with the Court that the void-for-nonparticipation rule operates only prospectively, see *ante*, at 441, because the rule does not affect any transportation provided prior to the lapse in participation that triggers application of the rule. Nevertheless, because *American Trucking* focused, not on retroactivity, but on the Commission's nullification of an *effective* tariff, the D. C. Circuit properly concluded that the decisive factor for *American Trucking*'s statutory analysis was the rejection of a tariff after its effective date. In other words, the D. C. Circuit was correct in stating in the disjunctive that "[t]he Commission is restricted [by *American Trucking*'s holding] whenever it attempts to invalidate (*or* alter the past effects of) a tariff after the application period has ended." *Overland Express*, *supra*, at 360 (emphasis added).

Perhaps realizing that the Act's provisions relating to the suspension or rejection of tariffs provide no authority for the void-for-nonparticipation rule, the Commission relies instead on § 10762(a)(1), which allows the Commission to "prescribe other information" to be included in tariffs. See *Wonderoast, Inc.*, 8 I. C. C. 2d 272, 275 (1992). That section, however, says nothing about enforcement of the requirements the Commission imposes, and thus does not—at least expressly—expand the scope of the Commission's enforcement mechanisms. Reading it to do so would pose the same problem that led us to construe § 10762(e) narrowly in *American Trucking.* An unlimited power to reject effective tariffs would render the "temporal and procedural constraints" of other sections of the Act "nugatory" and would permit the Commission to void a tariff "at any time and without any procedural safeguards." *American Trucking, supra,* at 363.

B

The absence of explicit authority in the Act does not end our inquiry, because Congress did not limit the Commission to the powers expressly granted by the Act. See 49 U. S. C. § 10321(a) ("Enumeration of a power of the Commission in this subtitle [§§ 10101–11917] does not exclude another power the Commission may have in carrying out this subtitle"). See also *American Trucking, supra,* at 364–365 ("The Commission's authority under the [Act] is not bounded by the powers expressly enumerated in the Act") (citing § 10321(a)). Thus, we have recognized that in addition to its express powers, the Commission has implied authority to take actions that are "direct[ly] adjunct to [its] explicit statutory power." 467 U. S., at 365 (internal quotation marks omitted). The Third Circuit, which applied the *American Trucking* analysis of the express and implied authority of the Commission, concluded that the void-for-nonparticipation rule is impliedly authorized by the Act because it is directly adjunct to the Commission's statutory power under § 10762(a)(1) to determine what information shall be included in tariffs. See 996 F. 2d, at 1525–1526. The court failed, however, to consider the relationship of the rule to the Act as a whole. Viewed in isolation, any remedy designed to enforce a regulation promulgated under the Act might be said to be "adjunct" to the relevant provision of the Act, but *Maislin* makes clear that the Act must be considered in its entirety. "[A]lthough . . . the Commission may have discretion to craft appropriate remedies for violations of the statute"—and, possibly, violations of its regulations—the remedy may not "effectively rende[r] nugatory the requirements of §§ 10761 and 10762" and thereby "conflic[t] directly with the core purposes of the Act." *Maislin,* 497 U. S., at 133.

Viewed in this light, it is clear that far from being "directly adjunct" to a statutory power of the Commission, the void-for-nonparticipation rule is directly contrary to the Act's commands and, indeed, to the essence of the filed rate doctrine. The rule nullifies an effective tariff—that is, one that has been filed and gone into effect, § 10762(a)(2), and has not been suspended or set aside by the Commission or canceled by the carrier—without "any agency action at all," *ante,* at 442, and allows to stand a rate negotiated between a carrier and a shipper but never filed. Like the policy contested in *Maislin,* the void-for-nonparticipation rule thus "undermines the basic structure of the Act" by sanctioning adherence to an unfiled rate. 497 U. S., at 132.[3]

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[3] When the Commission displaces or finds inapplicable a particular filed rate under other sections of the Act expressly authorizing it to do so, that rate is generally replaced either by a reasonable rate prescribed by the Commission, see 49 U. S. C. § 10704(b), or by a different *filed* rate. See *Maislin,* 497 U. S., at 129, n. 11 ("None of our cases involving a determination by the ICC that the carrier engaged in an unreasonable practice have required departure from the filed tariff schedule altogether; instead, they have required merely the application of a different filed tariff"); *ICC* v. *American Trucking Assns., Inc.,* 467 U. S. 354, 358 (1984). As JUSTICE GINSBURG explains, see *post,* at 457–458, by sanctioning a rate negotiated by the parties, the Commission, now with the Court's approval, condones

The ability of both carrier and shipper to rely on the tariff on file with the Commission is central to the Act's filed rate provisions. See *American Trucking*, 467 U. S., at 363–364, n. 7. Therefore, we have consistently held that "[u]nless and until suspended or set aside, [the rate in the published tariff] is made, for all purposes, the legal rate, as between carrier and shipper." *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U. S. 156, 163 (1922). See also *Maislin, supra*, at 126. This remains the case even if the filed tariff does not conform with technical filing requirements, see, *e. g., Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.*, 235 U. S. 371 (1914), or violates a clear prohibition in the statute. See *Davis* v. *Portland Seed Co.*, 264 U. S. 403 (1924) (enforcing tariff rate that unlawfully assessed a higher charge for a shorter shipment than a longer shipment along the same route). As long as a tariff is "received and placed on file by the Commission without any objection whatever . . . [and] as a matter of fact [is] adequate to give notice," that tariff controls. *Berwind-White, supra*, at 375.

There can be no doubt that petitioner's tariff was sufficiently complete "as a matter of fact" to give notice of the applicable charge. 235 U. S., at 375. Petitioner's tariff was filed with (and accepted by) the Commission and became effective well before the transportation at issue. It has never been suspended or set aside by the Commission or canceled by petitioner. At all times it stated that distances would be determined by reference to the HGCB distance guide—an effective, duly filed tariff. See App. 27. Neither respondent nor the Commission suggests any confusion or ambiguity as to what charge would be due under petitioner's tariff, but for the challenged void-for-nonparticipation rule. As JUSTICE GINSBURG explains, see *post*, at 458–459, petitioner and respondent could calculate the appropriate charge (if either desired) just as easily after petitioner's participation lapsed

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precisely the "secret" rates and the potential for price discrimination that the Act was intended to prohibit. See 49 U. S. C. § 10101(a)(1)(D).

as they could on the date petitioner's tariff was filed. Under our prior filed rate cases, nothing more is required for the filed tariff to be enforced.

IV

The Court's refusal to apply *American Trucking*'s two-step method of statutory analysis leads to a remarkable result: The Court upholds an agency regulation challenged as beyond the agency's statutory authority without ever considering whether any provision of the statute explicitly authorizes the regulation and, if not, whether the regulation is sufficiently related to an express statutory authority to be within the agency's implied powers. Indeed, much of the Court's analysis simply begs the question whether the Commission had authority to promulgate the void-for-nonparticipation rule.[4] In the Court's view, petitioner cannot appeal to our precedents governing the enforcement of filed tariffs because "under the regulations, distance tariffs are incomplete once the carrier's participation in the [HGCB] Mileage Guide has been canceled." *Ante,* at 443. Similarly, the Court concludes that *Maislin* requires that petitioner's tariff not be enforced because petitioner "had no rates on file because its tariff lacked an essential element." *Ante,* at 440. In both instances, the Court assumes that the void-for-nonparticipation rule is valid, and that petitioner's tariff is therefore void. But *whether* the Commission may deem the tariff incomplete as a matter of law through 49 CFR

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[4] In considering the case closed after rejecting the contention that the void-for-nonparticipation rule is impermissibly retroactive under *American Trucking,* the Court also ignores petitioner's broader argument. Although petitioner does assert that the void-for-nonparticipation rule is "retroactive," see Brief for Petitioner 7–16, it also contends more generally that the rule is not within the Commission's authority. See *id.,* at 17–24. Specifically, petitioner argues that the Act's "carefully integrated and complete system of procedures, remedies and penalties" does not "giv[e] the ICC the broad nullification power set forth in 49 C. F. R. § 1312.4(d)." *Id.,* at 17, 20.

§ 1312.4(d) (1993) is precisely the question we are asked to answer.[5]

In failing even to consider the Commission's authority to promulgate the void-for-nonparticipation rule, and thereby to void effective tariffs, the Court also fails to consider any limit the Act might place on that authority. Under the Court's holding, it would appear that the Commission could provide that tariffs will become void, without "any agency action at all," *ante*, at 442, because of any number of technical or substantive defects, all in the name of enforcing the provisions of the Act and ICC regulations. In each instance, noncompliance would enable a carrier and preferred shippers to negotiate more favorable rates with the assurance that the rate on file could not be enforced. Until the Commission examines the carrier's tariff carefully and sets it aside (actions ostensibly made unnecessary by the void-for-nonparticipation rule), the unfiled rates, rather than the filed-but-void tariff, will govern the relationship between the parties.

The unfortunate lesson for the Commission is that its Court-sanctioned voiding power provides the key to unraveling the Act's filed rate requirements.[6] If the Court is correct, the Commission's mistake in *Maislin* was its choice of remedies, not its objective. In *Maislin*, the Commission attempted to justify its policy of refusing to enforce a filed tariff rate where the parties had negotiated a different rate

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[5] The Court's suggestion that the carrier "cannot have it both ways," *ante*, at 440—that is, that it cannot rely rigidly on the filed rate doctrine in some cases to enforce the effective rates on file with the Commission and at the same time not suffer the harsh consequences of the doctrine when its rate on file is ineffective—presents the same problem. The Court assumes that there is no filed rate to bind any party in the absence of current participation in the HGCB distance guide.

[6] It is also worth noting that the Court's rationale should apply equally to other agencies operating under filed rate regimes, such as, for example, the Federal Communications Commission. See 47 U. S. C. § 203 (1988 ed. and Supp. IV).

"as a remedy for the carrier's failure to comply with § 10762's directive to file the negotiated rate with the ICC." 497 U. S., at 131. We rejected that rationale because "§ 10761 *requires* the carrier to collect the filed rate." *Ibid.* Under the reasoning the Court applies today, however, it appears that the Commission merely chose the wrong remedy: It should have promulgated a rule declaring a filed tariff "void as a matter of law" upon negotiation of a different rate, thereby rendering the filed rate unenforceable. Section 10761 and the filed rate doctrine would not stand in the way, in the Court's view, because the carrier would have no effective rate on file. See *ante,* at 439–443. In my view, the Court's reasoning will permit the Commission to turn the filed rate doctrine on its head.

For the foregoing reasons, I respectfully dissent.

JUSTICE GINSBURG, dissenting.

The filed rate doctrine is an integral part of the Interstate Commerce Act. See 49 U. S. C. § 10761(a) (a "carrier may not charge or receive a different compensation . . . than the rate specified in [its] tariff"). At least since 1915, this Court has held that the doctrine entitles a carrier to collect the rate on file with the Interstate Commerce Commission (Commission or ICC), despite a contract, negotiated between shipper and carrier, setting a lower price. See *Louisville & Nashville R. Co.* v. *Maxwell,* 237 U. S. 94, 97 (1915). The main rule to which we have adhered requires enforcement of the filed rate unless the Commission either rejects the tariff because of a formal or substantive defect, *before the rate takes effect,* 49 U. S. C. § 10762(e), or prospectively invalidates a tariff after initiating an investigation and finding the filed rate unreasonable. § 10704(b)(1). See *Keogh* v. *Chicago & Northwestern R. Co.,* 260 U. S. 156, 163 (1922) ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. *Unless and until suspended or set aside,* this rate is made, for all purposes, the legal rate, as between carrier and shipper.") (emphasis added).

Under our filed rate doctrine decisions, even defective filings, including those containing substantively unlawful rates, see *Davis* v. *Portland Seed Co.,* 264 U. S. 403, 425 (1924), normally control. See *ICC* v. *American Trucking Assns., Inc.,* 467 U. S. 354, 363–364, n. 7 (1984); *Berwind-White Coal Mining Co.* v. *Chicago & Erie R. Co.,* 235 U. S. 371, 375 (1914). A shipper's remedy, when a filed rate imposes an unlawful charge, ordinarily is confined to actual damages. See *American Trucking, supra,* at 364, n. 7 (citing *Boren-Stewart Co.* v. *Atchison, T. & S. F. R. Co.,* 196 I. C. C. 120 (1933), and *Acme Peat Products, Ltd.* v. *Akron, C. & Y. R. Co.,* 277 I. C. C. 641, 644 (1950)). The ICC may not reject a tariff once accepted and in effect, *American Trucking, supra,* at 360–364, unless two conditions are satisfied: First, the Commission's action must "further a specific statutory mandate"; second, the action "must be directly and closely tied to that mandate," 467 U. S., at 367.[1]

In the 1980's, as the Court recognizes, *ante,* at 438, many carriers responded to competitive pressures by ignoring the tariffs they had filed with the ICC and negotiating with shippers rates for carriage lower than the filed rates. When carrier bankruptcies ensued, trustees asserted claims against shippers for the difference between the filed rates and the negotiated rates. Reacting to these claims, the Commission refused to enforce filed rates when it appeared inequitable to exact from the shipper more than the negotiated lower price. In *Maislin Industries, U. S., Inc.* v. *Primary Steel, Inc.*, 497 U. S. 116 (1990), this Court held the ICC's nonenforcement policy inconsistent with the Act, explaining:

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[1] *American Trucking* itself is illustrative. There, the Court upheld the ICC's authority to reject effective tariffs to deter violations of "rate bureau agreements." Under such agreements, carriers may submit collective rates to the Commission without risking antitrust liability, provided the agreements conform to specific guidelines set forth in 49 U. S. C. § 10706(b)(3). Reasoning that Congress intended the Commission to "play a key role in holding carriers to the § 10706(b)(3) guidelines," and that the nullification in question "is directly aimed at ensuring that motor carriers comply with the [statutory] guidelines," the Court held the ICC's action permissible. 467 U. S., at 369, 370. In so holding, the Court stressed that its "concern over the harshness" of the remedy "is lessened by the significant steps the Commission has taken to ensure that the penalty will not be imposed unfairly." *Id.,* at 370.

> "[T]he filed rate doctrine . . . forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. By refusing to order collection of the filed rate solely because the parties had agreed to a lower rate, the ICC has permitted the very price discrimination that the Act by its terms seeks to prevent." *Id.*, at 130 (citation omitted).

Invoking the filed rate doctrine and case law elaborating on it, petitioner Security Services seeks to recover undercharges for shipments its predecessor, Riss International, made between November 1986 and December 1989. During the period for which recovery is sought, the ICC followed the policy later declared unlawful in *Maislin, i. e.*, the Commission routinely refused to order collection of the filed rate where the parties had agreed upon a lower rate. Newly professing strict adherence to the filed rate doctrine, the ICC now contends it may nonetheless void a carrier's tariff, though valid when filed, and uphold, in place of the filed rate, "secret" contract rates of the kind held invalid in *Maislin*. The ICC asserts it may do so for this reason: The carrier allowed a power of attorney to the Household Goods Carriers' Bureau (HGCB) to lapse and neglected to pay a nominal annual fee to maintain its membership participation in HGCB's Mileage Guide.[2] The Court upholds the ICC's position, describing the carrier's tariff as "lack[ing] an essential element," *ante*, at 440; "a carrier employing distance rates without purporting to be bound by stated distances," the

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[2] The fee was approximately $83. Tr. of Oral Arg. 10.

Court reasons, "would be just as well placed to discriminate among shippers by measuring with rubber instruments as it would be by charging shippers for a stated distance at mutable rates per mile." *Ibid.;* see also *ante,* at 443 ("We are dealing . . . with an incomplete tariff insufficient to support a reliable calculation of charges.").

It is difficult to regard the Commission's approach, and the Court's approval of it, as anything other than an end-run around the filed rate doctrine so recently and firmly upheld in *Maislin.* For the distances put forward in the tariff at issue are not genuinely in doubt. On the contrary, Riss' tariff explicitly incorporated the mileage figures from HGCB's Mileage Guide. A "close inspection of [HGCB's tariff supplement] might have raised some uncertainty in a shipper's mind about the propriety of [Riss'] reference to the Guide [Riss not having paid its dues], but not any uncertainty over the rate." *Overland Express, Inc.* v. *ICC,* 996 F. 2d 356, 361 (CADC 1993) (Silberman, J.), cert. pending, No. 93–883. As crisply stated in *Brizendine* v. *Cotter & Co.,* 4 F. 3d 457, 463–464 (CA7 1993) (Flaum, J.), cert. pending, No. 93–1129:

> "[S]urely [the carrier's] tariff provided sufficient information about its rates to give notice to its customers about the price of shipping. Any shipper who consulted [the carrier's] tariff would find the rate per mile and would know where to look—namely, to another tariff on file with the ICC—to determine the distance. . . . [T]he only way a curious shipper would ever know that [the carrier] failed to submit a power of attorney to HGCB would be if it looked up [the] filed rate; saw that the tariff refers to HGCB's mileage guide; inspected the mileage guide; noticed that page two of the guide states that it applies only to participating carriers listed in a supplement; turned to the supplement; and discovered that [the carrier's] name was missing."

Were the Commission in fact set on adherence to the filed rate doctrine, carriers like Riss could employ no "rubber instruments." Riss' tariff clearly said that the carrier incorporated the distances in HGCB's guide. The Commission could hold Riss to that representation, while imposing a sanction for the HGCB membership lapse that did not negate the filed rate. As Judge Flaum stated in *Brizendine:*

> "Under the filed rate doctrine, even tariffs that contain substantively unlawful rates or violate ICC filing rules are not nullities. The shipper must pay the rate on file, and may then sue for the harm, if any, caused by the tariff's unlawfulness or irregularity. The enforceability of published rates, however defective, discourages the parties (especially shippers, who may face undercharge suits later) from bargaining for other prices." 4 F. 3d, at 463 (citations and footnote omitted).

The Court attempts to justify the Commission's application of 49 CFR § 1312.4(d) (1993) as a "void-for-nonparticipation" rule by equating that rule to a tariff's expiration date. *Ante,* at 441–442. But *American Trucking* held that the Commission generally lacks authority to reject a tariff "once that tariff has gone into effect." 467 U. S., at 360; see *id.,* at 363, n. 7; *Brizendine, supra,* at 463 (*American Trucking* "makes clear that a carrier's submitted rate becomes the legal, governing rate when the ICC accepts it."). As Judge Silberman explained in *Overland Express:*

> "A regulation that purports to make a tariff[, once effective,] 'void' or 'ineffective' if a carrier fails to follow a procedural rule, . . . does not [escape] *American Trucking*'s holding. The Commission is restricted whenever it attempts to invalidate (or alter the past effects of) a tariff after [the tariff's effective date]. Otherwise, shippers and carriers could not rely confidently on the rate on file with the Commission, and . . . the filed rate doctrine would be undermined." 996 F. 2d, at 359–360.

Nor does the void-for-nonparticipation rule fit within the limited exception described in *American Trucking* for actions that directly and closely "further a specific statutory mandate," 467 U. S., at 367. The Commission says that its rule advances the ICC's "mandate to determine the information that is required to be disclosed in a tariff" to "ensure that tariffs reveal the applicable rates." Brief for United States et al. as *Amici Curiae* 24 (citing 49 U. S. C. §§ 10762(a)(1) and (b)(2)).[3] But as the Seventh Circuit observed:

> "[I]t is difficult to see how failure to [maintain in effect] a power of attorney [with the HGCB] would adversely affect the uniformity of pricing. The true purpose of the participation rule may be the facilitation of the ICC's ability to monitor the shipping market. Requiring that every publisher of a tariff list all the other carriers that have also signed onto that tariff enables the ICC to see, at a glance, how many carriers' rates are being controlled by a single tariff. Publishing that list provides no new information that is not available by inspecting each carrier's tariff individually—it simply collects it in one convenient place." *Brizendine, supra,* at 464.

Even if the Commission's action here furthered a statutory mandate, voiding a tariff after its effective date would not "be directly and closely tied to that mandate" under *American Trucking.* 467 U. S., at 367. Nullification of a rate can be an extremely harsh remedy, for it "renders the tariff void *ab initio.* As a result, whatever tariff was in effect prior to the adoption of the rejected rate becomes the applicable tariff for the [relevant] period." *Id.*, at 358 (citation omitted); *id.*, at 361.[4] Accordingly, when the Court upheld the Commission's action in *American Trucking* as "directly and closely" tailored to a specific statutory mandate, see n. 1, *supra*, it stressed that other less drastic remedies, like actual damages, would have been ineffective checks. See 467 U. S., at 369–370. Here, by contrast, there is no suggestion that relief of another kind would not do to check any cognizable injury to shippers or mileage guide publishers. See *Overland Express, supra*, at 362 ("[I]f shippers or mileage guide publishers were to show that they were injured, damages presumably would be adequate to remedy the injury."); see also *Brizendine, supra*, at 465.

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[3] Subsection 10762(a)(1) states that "[t]he Commission may prescribe other information that motor common carriers shall include in their tariffs"; subsection (b)(2) provides that "[t]he carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff."

* * *

It may be that "the Court stumbled badly in *Maislin Industries*." See *ante*, at 444 (STEVENS, J., concurring). But the way to correct that error, if error it was, is to overrule the unsatisfactory precedent, not to feign fidelity to it while avoiding its essential meaning.

For the reasons stated here, and more fully developed in *Brizendine* and *Overland Express*, I respectfully dissent.

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[4] Ironically, the Court's theory in this case—that Riss' tariff was valid and effective until its participation in the HGCB Mileage Guide lapsed, see *ante*, at 442—should result in application of Riss' "prior" effective tariff, *i. e.*, the *same* tariff, and not the contract rate, as the Court and the Commission assume.

DALTON, SECRETARY OF THE NAVY, ET AL. *v.* SPECTER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93–289. Argued March 2, 1994—Decided May 23, 1994

Respondents filed this action under the Administrative Procedure Act (APA) and the Defense Base Closure and Realignment Act of 1990 (1990 Act), seeking to enjoin the Secretary of Defense (Secretary) from carrying out the President's decision, pursuant to the 1990 Act, to close the Philadelphia Naval Shipyard. The District Court dismissed the complaint on the alternative grounds that the 1990 Act itself precluded judicial review and that the political question doctrine foreclosed judicial intervention. In affirming in part and reversing in part, the Court of Appeals held that judicial review of the closure decision was available to ensure that the Secretary and the Defense Base Closure and Realignment Commission (Commission), as participants in the selection process, had complied with the procedural mandates specified by Congress. The court also ruled that this Court's recent decision in *Franklin* v. *Massachusetts*, 505 U. S. 788, did not affect the reviewability of respondents' procedural claims because adjudging the President's actions for compliance with the 1990 Act was a form of constitutional review sanctioned by *Franklin*.

Held: Judicial review is not available for respondents' claims. Pp. 468–477.

(a) A straightforward application of *Franklin* demonstrates that respondents' claims are not reviewable under the APA. The actions of the Secretary and the Commission are not reviewable "final agency actions" within the meaning of the APA, since their reports recommending base closings carry no direct consequences. See 505 U. S., at 798. Rather, the action that "will directly affect" bases, *id.*, at 797, is taken by the President when he submits his certificate of approval of the recommendations to Congress. That the President cannot pick and choose among bases, and must accept or reject the Commission's closure package in its entirety, is immaterial; it is nonetheless the President, not the Commission, who takes the final action that affects the military installations. See *id.*, at 799. The President's own actions, in turn, are not reviewable under the APA because he is not an "agency" under that Act. See *id.*, at 801. Pp. 468–471.

(b) The Court of Appeals erred in ruling that the President's base closure decisions are reviewable for constitutionality. Every action by the President, or by another elected official, in excess of his statutory authority is not *ipso facto* in violation of the Constitution, as the Court of Appeals seemed to believe. On the contrary, this Court's decisions have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, *e. g., Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 691, n. 11; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585, 587, distinguished. Such decisions demonstrate that the claim at issue here—that the President violated the 1990 Act's terms by accepting flawed recommendations—is not a "constitutional" claim subject to judicial review under the exception recognized in *Franklin*, but is simply a statutory claim. The 1990 Act does not limit the President's discretion in approving or disapproving the Commission's recommendations, require him to determine whether the Secretary or Commission committed procedural violations in making recommendations, prohibit him from approving recommendations that are procedurally flawed, or, indeed, prevent him from approving or disapproving recommendations for whatever reason he sees fit. Where, as here, a statute commits decisionmaking to the President's discretion, judicial review of his decision is not available. See, *e. g., Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113–114. Pp. 471–476.

(c) Contrary to respondents' contention, failure to allow judicial review here does not result in the virtual repudiation of *Marbury* v. *Madison*, 1 Cranch 137, and nearly two centuries of constitutional adjudication. The judicial power conferred by Article III is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute. Pp. 476–477.

995 F. 2d 404, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, Part II of which was unanimous, and in the remainder of which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. BLACKMUN, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 477. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, *post*, p. 478.

Solicitor General Days argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, John F. Manning,* and *Douglas N. Letter.*

Senator Arlen Specter, pro se, argued the cause for respondents. With him on the brief were *Bruce W. Kauff-*

man, Mark J. Levin, Camille Spinello Andrews, and *Thomas E. Groshens.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents sought to enjoin the Secretary of Defense (Secretary) from carrying out a decision by the President to close the Philadelphia Naval Shipyard.[1] This decision was made pursuant to the Defense Base Closure and Realignment Act of 1990 (1990 Act or Act), 104 Stat. 1808, as amended, note following 10 U. S. C. § 2687 (1988 ed., Supp. IV). The Court of Appeals held that judicial review of the decision was available to ensure that various participants in the selection process had complied with procedural mandates specified by Congress. We hold that such review is not available.

The decision to close the shipyard was the end result of an elaborate selection process prescribed by the 1990 Act. Designed "to provide a fair process that will result in the timely closure and realignment of military installations inside the United States," § 2901(b),[2] the Act provides for three successive rounds of base closings—in 1991, 1993, and 1995, § 2903(c)(1). For each round, the Secretary must prepare closure and realignment recommendations, based on selection criteria he establishes after notice and an opportunity for public comment. §§ 2903(b) and (c).

**Robert J. Cynkar, John B. Rhinelander, Alexander W. Joel, Bernard Petrie,* and *Steven T. Walther* filed a brief for Business Executives for National Security as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *G. Oliver Koppell,* Attorney General, *Jerry Boone,* Solicitor General, *Peter H. Schiff,* Deputy Solicitor General, and *Alan S. Kaufman, Edward M. Scher,* and *Howard L. Zwickel,* Assistant Attorneys General; and for Public Citizen by *Patti A. Goldman, Alan B. Morrison,* and *Paul R. Q. Wolfson.*

[1] Respondents are shipyard employees and their unions; Members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the city of Philadelphia. Petitioners are the Secretary of Defense; the Secretary of the Navy; and the Defense Base Closure and Realignment Commission and its members.

[2] For ease of reference, all citations to the 1990 Act are to the relevant sections of the Act as it appears in note following 10 U. S. C. § 2687 (1988 ed., Supp. IV).

The Secretary submits his recommendations to Congress and to the Defense Base Closure and Realignment Commission (Commission), an independent body whose eight members are appointed by the President, with the advice and consent of the Senate. §§ 2903(c)(1); 2902(a) and (c)(1)(A). The Commission must then hold public hearings and prepare a report, containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures and realignments. §§ 2903(d)(1) and (2). Within roughly three months of receiving the Secretary's recommendations, the Commission has to submit its report to the President. § 2903(d)(2)(A).

Within two weeks of receiving the Commission's report, the President must decide whether to approve or disapprove, in their entirety, the Commission's recommendations. §§ 2903(e)(1)–(3). If the President disapproves, the Commission has roughly one month to prepare a new report and submit it to the President. § 2903(e)(3). If the President again disapproves, no bases may be closed that year under the Act. § 2903(e)(5). If the President approves the initial or revised recommendations, the President must submit the recommendations, along with his certification of approval, to Congress. §§ 2903(e)(2) and (e)(4). Congress may, within 45 days of receiving the President's certification (or by the date Congress adjourns for the session, whichever is earlier), enact a joint resolution of disapproval. §§ 2904(b); 2908. If such a resolution is passed, the Secretary may not carry out any closures pursuant to the Act; if such a resolution is not passed, the Secretary must close all military installations recommended for closure by the Commission. §§ 2904(a) and (b)(1).

In April 1991, the Secretary recommended the closure or realignment of a number of military installations, including the Philadelphia Naval Shipyard. After holding public hearings in Washington, D. C., and Philadelphia, the Commission recommended closure or realignment of 82 bases. The Commission did not concur in all of the Secretary's recommendations, but it agreed that the Philadelphia Naval Shipyard should be closed. In July 1991, President Bush approved the Commission's recommendations, and the House of Representatives rejected a proposed joint resolution of disapproval by a vote of 364 to 60.

Two days before the President submitted his certification of approval to Congress, respondents filed this action under the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.*, and the 1990 Act. Their complaint contained three counts, two of which remain at issue.[3] Count I alleged that the Secretaries of Navy and Defense violated substantive and procedural requirements of the 1990 Act in recommending closure of the Philadelphia Naval Shipyard. Count II made similar allegations regarding the Commission's recommendations to the President, asserting specifically that, *inter alia*, the Commission used improper criteria, failed to place certain information in the record until after the close of public hearings, and held closed meetings with the Navy.

The United States District Court for the Eastern District of Pennsylvania dismissed the complaint in its entirety, on the alternative grounds that the 1990 Act itself precluded judicial review and that the political question doctrine foreclosed judicial intervention. *Specter* v. *Garrett,* 777 F. Supp. 1226 (1991). A divided panel of the United States Court of Appeals for the Third Circuit affirmed in part and reversed in part. *Specter* v. *Garrett,* 971 F. 2d 936 (1992) *(Specter I).* The Court of Appeals first acknowledged that the actions challenged by respondents were not typical of the "agency actions" reviewed under the APA, because the 1990 Act contemplates joint decisionmaking among the Secretary, Commission, President, and Congress. *Id.,* at 944–945. The Court of Appeals then reasoned that because respondents sought to enjoin the implementation of the President's decision, respondents (who had not named the President as a defendant) were asking the Court of Appeals "to review a presidential decision." *Id.,* at 945. The Court of Appeals decided that there could be judicial review of the President's decision because the "actions of the President have never been considered immune from judicial review solely because they were taken by the President." *Ibid.* It held that certain procedural claims, such as respondents' claim that the Secretary failed to transmit to the Commission all of the information he used in making his recommendations, and their claim that the Commission did not hold public hearings as required by the Act, were thus reviewable. *Id.,* at 952–953. The dissenting judge took the view that the 1990 Act precluded judicial review of all statutory claims, procedural and substantive. *Id.,* at 956–961.

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[3] Respondents' third count alleged that petitioners had violated the due process rights of respondent shipyard employees and respondent unions. In its initial decision, the United States Court of Appeals for the Third Circuit held that the shipyard employees and unions had no protectible property interest in the shipyard's continued operation and thus had failed to state a claim under the Due Process Clause. *Specter* v. *Garrett*, 971 F. 2d 936, 955–956 (1992). Respondents did not seek further review of that ruling, and it is not at issue here.

Shortly after the Court of Appeals issued its opinion, we decided *Franklin* v. *Massachusetts,* 505 U. S. 788 (1992), in which we addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act requires the Secretary of Commerce to submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled pursuant to a statutory formula. We concluded both that the Secretary's report was not "final agency action" reviewable under the APA, and that the APA does not apply to the President. *Id.*, at 796–801. After we rendered our decision in *Franklin*, petitioners sought our review in this case. Because of the similarities between *Franklin* and this case, we granted the petition for certiorari, vacated the judgment of the Court of Appeals, and remanded for further consideration in light of *Franklin*. *O'Keefe* v. *Specter*, 506 U. S. 969 (1992).

On remand, the same divided panel of the Court of Appeals adhered to its earlier decision, and held that *Franklin* did not affect the reviewability of respondents' procedural claims. *Specter* v. *Garrett*, 995 F. 2d 404 (1993) *(Specter II)*. Although apparently recognizing that APA review was unavailable, the Court of Appeals felt that adjudging the President's actions for compliance with the 1990 Act was a "form of constitutional review," and that *Franklin* sanctioned such review. 995 F. 2d, at 408–409. Petitioners again sought our review, and we granted certiorari. 510 U. S. 930 (1993). We now reverse.

I

We begin our analysis on common ground with the Court of Appeals. In *Specter II*, that court acknowledged, at least tacitly, that respondents' claims are not reviewable under the APA. 995 F. 2d, at 406. A straightforward application of *Franklin* to this case demonstrates why this is so. *Franklin* involved a suit against the President, the Secretary of Commerce, and various public officials, challenging the manner in which seats in the House of Representatives had been apportioned among the States. 505 U. S., at 790. The plaintiffs challenged the method used by the Secretary of Commerce in preparing her census report, particularly the manner in which she counted federal employees working overseas. The plaintiffs raised claims under both the APA and the Constitution. In reviewing the former, we first sought to determine whether the Secretary's action, in submitting a census report to the President, was "final" for purposes of APA review. (The APA provides for judicial review only of "*final* agency action." 5 U. S. C. § 704 (emphasis added).) Because the President reviewed (and could revise) the Secretary's report, made the apportionment calculations, and submitted the final apportionment report to Congress, we held that the Secretary's report was "not final and therefore not subject to review." 505 U. S., at 798.

We next held that the President's actions were not reviewable under the APA, because the President is not an "agency" within the meaning of the APA. *Id.*, at 801 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements"). We thus concluded that the reapportionment determination was not reviewable under the standards of the APA. *Ibid.* In reaching our conclusion, we noted that the "President's actions may still be reviewed for constitutionality." *Ibid.* (citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388 (1935)).

In this case, respondents brought suit under the APA, alleging that the Secretary and the Commission did not follow the procedural mandates of the 1990 Act. But here, as in *Franklin*, the prerequisite to review under the APA—"final agency action"—is lacking. The reports submitted by the Secretary and the Commission, like the report of the Secretary of Commerce in *Franklin*, "carr[y] no direct consequences" for base closings. 505 U. S., at 798. The action that "will directly affect" the military bases, *id.*, at 797, is taken by the President, when he submits his certification of approval to Congress. Accordingly, the Secretary's and Commission's reports serve "more like a tentative recommendation than a final and binding determination." *Id.*, at 798. The reports are, "like the ruling of a subordinate official, not final and therefore not subject to review." *Ibid.* (internal quotation marks and citation omitted). The actions of the President, in turn, are not reviewable under the APA because, as we concluded in *Franklin*, the President is not an "agency." See *id.*, at 800–801.

Respondents contend that the 1990 Act differs significantly from the Census Act at issue in *Franklin*, and that our decision in *Franklin* therefore does not control the question whether the Commission's actions here are final. Respondents appear to argue that the President, under the 1990 Act, has little authority regarding the closure of bases. See Brief for Respondents 29 (pointing out that the 1990 Act does not allow "the President to ignore, revise or amend the Commission's list of closures. He is only permitted to accept or reject the Commission's closure package in its entirety"). Consequently, respondents continue, the Commission's report must be regarded as final. This argument ignores the *ratio decidendi* of *Franklin*. See 505 U. S., at 800–801.

First, respondents underestimate the President's authority under the Act, and the importance of his role in the base closure process. Without the President's approval, no bases are closed under the Act, see § 2903(e)(5); the Act, in turn, does not by its terms circumscribe the President's discretion to approve or disapprove the Commission's report. Cf. *id.*, at 799. Second, and more fundamentally, respondents' argument ignores "[t]he core question" for determining finality: "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Id.*, at 797. That the President cannot pick and choose among bases, and must accept or reject the entire package offered by the Commission, is immaterial. What is crucial is the fact that "[t]he President, not the [Commission], takes the final action that affects" the military installations. *Id.*, at 799. Accordingly, we hold that the decisions made pursuant to the 1990 Act are not reviewable under the APA. Accord, *Cohen* v. *Rice*, 992 F. 2d 376 (CA1 1993).

Although respondents apparently sought review exclusively under the APA,[4] the Court of Appeals nevertheless sought to determine whether non-APA review, based on either common law or constitutional principles, was available. It focused, moreover, on whether the President's actions under the 1990 Act were reviewable, even though respondents did not name the President as a defendant. The Court of Appeals reasoned that because respondents sought to enjoin the implementation of the President's decision, the legality of that decision would determine whether an injunction should issue. See *Specter II*, 995 F. 2d, at 407; *Specter I*, 971 F. 2d, at 936. In this rather curious fashion, the case was transmuted into one concerning the reviewability of Presidential decisions.

II

Seizing upon our statement in *Franklin* that Presidential decisions are reviewable for constitutionality, the Court of Appeals asserted that "there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine." *Specter II*, *supra*, at 408. It reasoned, relying primarily on *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), that whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine. Thus, judicial review must be available to determine whether the President has statutory authority "for whatever action" he takes. 995 F. 2d, at 409. In terms of this case, the Court of Appeals concluded that the President's statutory authority to close and realign bases would be lacking if the Secretary and Commission violated the procedural requirements of the Act in formulating their recommendations. *Ibid.*

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[4] See *Specter* v. *Garrett*, 995 F. 2d 404, 412 (1993) (Alito, J., dissenting); see also *Specter* v. *Garrett*, 777 F. Supp. 1226, 1227 (ED Pa. 1991) (respondents "have asserted that their right to judicial review . . . arises under the Administrative Procedure Act").

Accepting for purposes of decision here the propriety of examining the President's actions, we nonetheless believe that the Court of Appeals' analysis is flawed. Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. See, *e. g., Wheeldin* v. *Wheeler,* 373 U. S. 647, 650–652 (1963) (distinguishing between "rights which may arise under the Fourth Amendment" and "a cause of action for abuse of the [statutory] subpoena power by a federal officer"); *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 396–397 (1971) (distinguishing between "actions contrary to [a] constitutional prohibition," and those "merely said to be in excess of the authority delegated . . . by the Congress").

In *Larson* v. *Domestic and Foreign Commerce Corp.,* 337 U. S. 682, 691, n. 11 (1949), for example, we held that sovereign immunity would not shield an executive officer from suit if the officer acted either "unconstitutionally *or* beyond his statutory powers." (Emphasis added.) If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, as the Court of Appeals seemed to believe, there would have been little need in *Larson* for our specifying unconstitutional and ultra vires conduct as separate categories. See also *Dugan* v. *Rank,* 372 U. S. 609, 621–622 (1963); *Harmon* v. *Brucker,* 355 U. S. 579, 581 (1958) ("In keeping with our duty to avoid deciding constitutional questions presented unless essential to proper disposition of a case, we look first to petitioners' *non-constitutional claim* that respondent [Secretary of the Army] *acted in excess of powers granted him by Congress*" (emphasis added)).

Our decision in *Youngstown, supra,* does not suggest a different conclusion. In *Youngstown,* the Government disclaimed any statutory authority for the President's seizure of steel mills. See 343 U. S., at 585 ("[W]e do not understand the Government to rely on statutory authorization for this seizure"). The only basis of authority asserted was the President's inherent constitutional power as the Executive and the Commander in Chief of the Armed Forces. *Id.,* at 587. Because no statutory authority was claimed, the case necessarily turned on whether the Constitution authorized the President's actions. *Youngstown* thus involved the conceded *absence* of *any* statutory authority, not a claim that the President acted in excess of such authority. The case cannot be read for the proposition that an action taken by the President in excess of his statutory authority necessarily violates the Constitution.[5]

The decisions cited above establish that claims simply alleging that the President has exceeded his statutory authority are not "constitutional" claims, subject to judicial review under the exception recognized in *Franklin.*[6] As this case demonstrates, if every claim alleging that the President exceeded his statutory authority were considered a constitutional claim, the exception identified in *Franklin* would be broadened beyond recognition. The distinction between claims that an official exceeded his statutory authority, on the one hand, and claims that he acted in violation of the Constitution, on the other, is too well established to permit this sort of evisceration.

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[5] *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), the other case (along with *Youngstown*) cited in *Franklin* v. *Massachusetts,* 505 U. S. 788 (1992), as an example of when we have reviewed the constitutionality of the President's actions, likewise did not involve a claim that the President acted in excess of his statutory authority. *Panama Refining* involved the National Industrial Recovery Act, which delegated to the President the authority to ban interstate transportation of oil produced in violation of state production and marketing limits. See 293 U. S., at 406. We struck down an Executive Order promulgated under that Act not because the President had acted beyond his statutory authority, but rather because the Act unconstitutionally delegated Congress' authority to the President. See *id.,* at 430. As the Court pointed out, we were "not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power." *Id.,* at 432 (footnote omitted). Respondents have not alleged that the 1990 Act in itself amounts to an unconstitutional delegation of authority to the President.

So the claim raised here is a statutory one: The President is said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations. The exception identified in *Franklin* for review of constitutional claims thus does not apply in this case. We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA. See *Dames & Moore* v. *Regan,* 453 U. S. 654, 667 (1981). But longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President.

As we stated in *Dakota Central Telephone Co.* v. *South Dakota ex rel. Payne,* 250 U. S. 163, 184 (1919), where a claim

> "concerns not a want of [Presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

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[6] As one commentator has observed, in cases in which the President concedes, either implicitly or explicitly, that the only source of his authority is statutory, no "constitutional question whatever" is raised. J. Choper, Judicial Review and the National Political Process 316 (1980). Rather, "the cases concern only issues of statutory interpretation." *Ibid.*

In a case analogous to the present one, *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103 (1948), an airline denied a certificate from the Civil Aeronautics Board to establish an international air route sought judicial review of the denial. Although the Civil Aeronautics Act, 49 U. S. C. § 646 (1946 ed.), generally allowed for judicial review of the Board's decisions, and did not explicitly exclude judicial review of decisions involving international routes of domestic airlines, we nonetheless held that review was unavailable. 333 U. S., at 114.

In reasoning pertinent to this case, we first held that the Board's certification was not reviewable because it was not final until approved by the President. See *id.*, at 112–114 ("[O]rders of the Board as to certificates for overseas or foreign air transportation are not mature and are therefore not susceptible of judicial review at any time before they are finalized by Presidential approval"). We then concluded that the President's decision to approve or disapprove the orders was not reviewable, because "the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate." See *id.*, at 114. We fully recognized that the consequence of our decision was to foreclose judicial review:

> "The dilemma faced by those who demand judicial review of the Board's order is that before Presidential approval it is not a final determination . . . and after Presidential approval the whole order, both in what is approved without change as well as in amendments which he directs, derives its vitality from the exercise of *unreviewable Presidential discretion.*" *Id.*, at 113 (emphasis added).

Although the President's discretion in *Waterman S. S. Corp.* derived from the Constitution, we do not believe the result should be any different when the President's discretion derives from a valid statute. See *Dakota Central Telephone*

Co., supra, at 184; *United States* v. *George S. Bush & Co.,* 310 U. S. 371, 380 (1940).

The 1990 Act does not at all limit the President's discretion in approving or disapproving the Commission's recommendations. See § 2903(e); see also *Specter II,* 995 F. 2d, at 413 (Alito, J., dissenting). The Third Circuit seemed to believe that the President's authority to close bases depended on the Secretary's and Commission's compliance with statutory procedures. This view of the statute, however, incorrectly conflates the duties of the Secretary and Commission with the authority of the President. The President's authority to act is not contingent on the Secretary's and Commission's fulfillment of all the procedural requirements imposed upon them by the 1990 Act. Nothing in § 2903(e) requires the President to determine whether the Secretary or Commission committed any procedural violations in making their recommendations, nor does § 2903(e) prohibit the President from approving recommendations that are procedurally flawed. Indeed, nothing in § 2903(e) prevents the President from approving or disapproving the recommendations for whatever reason he sees fit. See § 2903(e); *Specter II,* 995 F. 2d, at 413 (Alito, J., dissenting).

How the President chooses to exercise the discretion Congress has granted him is not a matter for our review. See *Waterman S. S. Corp., supra; Dakota Central Telephone Co., supra,* at 184. As we stated in *George S. Bush & Co., supra,* at 380, "[n]o question of law is raised when the exercise of [the President's] discretion is challenged."

III

In sum, we hold that the actions of the Secretary and the Commission cannot be reviewed under the APA because they are not "final agency actions." The actions of the President cannot be reviewed under the APA because the President is not an "agency" under that Act. The claim that the President exceeded his authority under the 1990 Act is not a constitutional claim, but a statutory one. Where a statute, such as the 1990 Act, commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available.

Respondents tell us that failure to allow judicial review here would virtually repudiate *Marbury* v. *Madison*, 1 Cranch 137 (1803), and nearly two centuries of constitutional adjudication. But our conclusion that judicial review is not available for respondents' claim follows from our interpretation of an Act of Congress, by which we and all federal courts are bound. The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute.

The judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

I did not join the majority opinion in *Franklin* v. *Massachusetts*, 505 U. S. 788 (1992), and would not extend that unfortunate holding to the facts of this case. I nevertheless agree that the Defense Base Closure and Realignment Act of 1990 "preclud[es] judicial review of a base-closing decision," *post*, at 484, and accordingly join JUSTICE SOUTER's opinion.

I write separately to underscore what I understand to be the limited reach of today's decision. The majority and concurring opinions conclude that the President acts within his unreviewable discretion in accepting or rejecting a recommended base-closing list, and that an aggrieved party may not enjoin closure of a duly selected base as a result of alleged error in the decisionmaking process. This conclusion, however, does not foreclose judicial review of a claim, for example, that the President added a base to the Defense

Base Closure and Realignment Commission's (Commission's) list in contravention of his statutory authority. Nor does either opinion suggest that judicial review would be unavailable for a timely claim seeking direct relief from a procedural violation, such as a suit claiming that a scheduled meeting of the Commission should be public, see § 2903(d), note following 10 U. S. C. § 2687 (1988 ed., Supp. IV), or that the Secretary of Defense should publish the proposed selection criteria and provide an opportunity for public comment, §§ 2903(b) and (c). Such a suit could be timely brought and adjudicated without interfering with Congress' intent to preclude judicial "cherry pick[ing]" or frustrating the statute's expedited decisionmaking schedule. See *post,* at 481. I also do not understand the majority's *Franklin* analysis to foreclose such a suit, since a decision to close the Commission's hearing, for example, would "'directly affect'" the rights of interested parties independent of any ultimate Presidential review. See *ante,* at 470; cf. *FCC* v. *ITT World Communications, Inc.,* 466 U. S. 463 (1984).

With the understanding that neither a challenge to ultra vires exercise of the President's statutory authority nor a timely procedural challenge is precluded, I join JUSTICE SOUTER's concurrence and Part II of the opinion of the Court.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

I join Part II of the Court's opinion because I think it is clear that the President acted wholly within the discretion afforded him by the Defense Base Closure and Realignment Act of 1990 (Act), and because respondents pleaded no constitutional claim against the President, indeed, no claim against the President at all. As the Court explains, the Act grants the President unfettered discretion to accept the Commission's base-closing report or to reject it, for a good reason, a bad reason, or no reason. See *ante,* at 476.

It is not necessary to reach the question the Court answers in Part I, whether the Defense Base Closure and Realignment Commission's (Commission's) report is final agency action, because the text, structure, and purpose of the Act compel the conclusion that judicial review of the Commission's or the Secretary's compliance with it is precluded. There is, to be sure, a "strong presumption that Congress did not mean to prohibit all judicial review." *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 672 (1986) (internal quotation marks and citation omitted). But although no one feature of the Act, taken alone, is enough to overcome that strong presumption, I believe that the combination present in this unusual legislative scheme suffices.

In adopting the Act, Congress was intimately familiar with repeated, unsuccessful, efforts to close military bases in a rational and timely manner. See generally Defense Base Closure and Realignment Commission, Report to the President 1991.[1] That history of frustration is reflected in the Act's text and intricate structure, which plainly express congressional intent that action on a base-closing package be quick and final, or no action be taken at all.

At the heart of the distinctive statutory regime, Congress placed a series of tight and rigid deadlines on administrative review and Presidential action, embodied in provisions for three biennial rounds of base closings, in 1991, 1993, and 1995 (the "base-closing years"), §§2903(b) and (c), note following 10 U. S. C. §2687 (1988 ed., Supp. IV), with unbending deadlines prescribed for each round. The Secretary is obliged to forward base-closing recommendations to the Commission, no later, respectively, than April 15, 1991, March 15, 1993, and March 15, 1995. § 2903(c). The Comptroller General must submit a report to Congress and the Commission evaluating the Secretary's recommendations by April 15 of each base-closing year. § 2903(d)(5). The Commission must then transmit a report to the President setting out its own recommendations by July 1 of each of those years. § 2903(d)(2). And in each such year, the President must, no later than July 15, either approve or disapprove the Commission's recommendations. § 2903(e)(1). If the President disapproves the Commission's report, the Commission must send the President a revised list of recommended base closings, no later than August 15. § 2903(e)(3). In that event, the President will have until September 1 to approve the Commission's revised report; if the President fails to approve the report by that date, then no bases will be closed that year. § 2903(e)(5). If, however, the President approves a Commission report within either of the times allowed, the report becomes effective unless Congress disapproves the President's decision by joint resolution (passed according to provisions for expedited and circumscribed internal procedures) within 45 days. §§ 2904(b)(1)(A), 2908.[2]

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[1] See also H. R. Conf. Rep. No. 101–923, p. 705 (1990) (Earlier base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"); *id.*, at 707 (Act "would considerably enhance the ability of the Department of Defense . . . promptly [to] implement proposals for base closures and realignment"); H. R. Rep. No. 101–665, p. 384 (1990) ("Expedited procedures . . . are essential to make the base closure process work").

The Act requires that a decision about a base-closing package, once made, be implemented promptly. Once Congress has declined to disapprove the President's base-closing decision, the Secretary of Defense "shall . . . close all military installations recommended for closure." § 2904(a). The Secretary is given just two years after the President's transmittal to Congress to begin the complicated process of closing the listed bases and must complete each base-closing round within six years of the President's transmittal. See §§ 2904, 2905.

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[2] To enable Congress to perform this prompt review, the Act requires the Secretary, the Comptroller General, and the Commission to provide Congress with information prior to the completion of Executive Branch review. See §§ 2903(a)(1), (b)(2), (c)(1), and (d)(3).

It is unlikely that Congress would have insisted on such a timetable for decision and implementation if the base-closing package would be subject to litigation during the periods allowed, in which case steps toward closing would either have to be delayed in deference to the litigation, or the litigation might be rendered moot by completion of the closing process. That unlikelihood is underscored by the provision for disbanding the Commission at the end of each base-closing decision round, and for terminating it automatically at the end of 1995, whether or not any bases have been selected to be closed. If Congress intended judicial review of individual base-closing decisions, it would be odd indeed to disband biennially, and at the end of three rounds to terminate, the only entity authorized to provide further review and recommendations.

The point that judicial review was probably not intended emerges again upon considering the linchpin of this unusual statutory scheme, which is its all-or-nothing feature. The President and Congress must accept or reject the biennial base-closing recommendations as a single package. See §§2903(e)(2), (e)(3), (e)(4) (as to the President); §§2908(a)(2) and (d)(2) (as to Congress). Neither the President nor Congress may add a base to the list or "cherry pick" one from it. This mandate for prompt acceptance or rejection of the entire package of base closings can only represent a considered allocation of authority between the Executive and Legislative Branches to enable each to reach important, but politically difficult, objectives. Indeed, the wisdom and ultimate political acceptability of a decision to close any one base depends on the other closure decisions joined with it in a given package, and the decisions made in the second and third rounds just as surely depend (or will depend) on the particular content of the package or packages of closings that will have preceded them. If judicial review could eliminate one base from a package, the political resolution embodied in that package would be destroyed; if such review could eliminate an entire package, or leave its validity in doubt when a succeeding one had to be devised, the political resolution necessary to agree on the succeeding package would be rendered the more difficult, if not impossible. The very reasons that led Congress by this enactment to bind its hands from untying a package, once assembled, go far to persuade me that Congress did not mean the courts to have any such power through judicial review.

When combined with these strict timetables for decision, the temporary nature of the Commission, the requirement for prompt implementation, and the all-or-nothing base-closing requirement at the core of the Act, two secondary features of the legislation tend to reinforce my conclusion that judicial review was not intended. First, the Act provides nonjudicial opportunities to assess any procedural (or other) irregularities. The Commission and the Comptroller General review the Secretary's recommendations, see §§ 2903(d)(5), 2903(d)(3), and each can determine whether the Secretary has provided adequate information for reviewing the soundness of his recommendations.[3] The President may, of course, also take procedural irregularities into account in deciding whether to seek new recommendations from the Commission, or in deciding not to approve the Commission's recommendations altogether. And, ultimately, Congress may decide during its 45-day review period whether procedural failings call the Presidentially approved recommendations so far into question as to justify their substantive rejection.[4]

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[3] Petitioners represent, indeed, that as to the round in question, the Comptroller General reported to Congress on procedural irregularities (as well as substantive differences of opinion) and requested additional information from the Secretary (which was provided). See Reply Brief for Petitioners 16, n. 12.

[4] In approving the base closings for 1991, Congress was apparently well aware of claims of procedural shortcomings, but nonetheless chose not to disapprove the list. See Department of Defense Appropriations Act, 1992, Pub. L. 102–172, § 8131, 105 Stat. 1208.

Second, the Act does make express provision for judicial review, but only of objections under the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, as amended, 42 U. S. C. §4321 *et seq.*, to implementation plans for a base closing, and only after the process of selecting a package of bases for closure is complete. Because NEPA review during the base-closing decision process had stymied or delayed earlier efforts,[5] the Act, unlike prior legislation addressed to base closing, provides that NEPA has no application at all until after the President has submitted his decision to Congress and the process of selecting bases for closure has been completed. See §2905(c)(1). NEPA then applies only to claims arising out of actual disposal or relocation of base property, not to the prior decision to choose one base or another for closing. §2905(c)(2). The Act by its terms allows for "judicial review, with respect to any requirement of [NEPA]" made applicable to the Act by §2905(c)(2), but requires the action to be initiated within 60 days of the Defense Department's act or omission as to the closing of a base. §2905(c)(3). This express provision for judicial review of certain NEPA claims within a narrow time frame supports the conclusion that the Act precludes judicial review of other matters, not simply because the Act fails to provide expressly for such review, but because Congress surely would have prescribed similar time limits to preserve its considered schedules if review of other claims had been intended.

In sum, the text, structure, and purpose of the Act clearly manifest congressional intent to confine the base-closing selection process within a narrow time frame before inevitable political opposition to an individual base closing could become overwhelming, to ensure that the decisions be implemented promptly, and to limit acceptance or rejection to a package of base closings as a whole, for the sake of political feasibility. While no one aspect of the Act, standing alone, would suffice to overcome the strong presumption in favor of judicial review, this structure (combined with the Act's provision for Executive and congressional review, and its requirement of time-constrained judicial review of implementation under NEPA) can be understood no other way than as precluding judicial review of a base-closing decision under the scheme that Congress, out of its doleful experience, chose to enact. I conclude accordingly that the Act forecloses such judicial review.

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[5] See, *e. g.*, H. R. Conf. Rep. No. 100–1071, p. 23 (1988).

I thus join in Part II of the opinion of the Court, and in its judgment.

CUSTIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93–5209. Argued February 28, 1994—Decided May 23, 1994

After the jury convicted petitioner Custis of possession of a firearm by a felon and another federal crime, the Government relied on his prior state-court convictions for robbery in Pennsylvania and for burglary and attempted burglary in Maryland to support a motion under the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e) (ACCA), which provides for enhancement of the sentence of a convicted firearms possessor who "has three previous convictions . . . for a violent felony or a serious drug offense." Custis challenged the use for this purpose of the two Maryland convictions on the ground, among others, of ineffective assistance of counsel during the state prosecutions, but the District Court held that § 924(e)(1) provides no statutory right to challenge such convictions and that the Constitution bars the use of a prior conviction for enhancement only when there was a complete denial of counsel in the prior proceeding. Custis was sentenced to an enhanced term of 235 months in prison, and the Court of Appeals affirmed.

Held:

1. With the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA. Pp. 490–497.

(a) Congress did not intend to permit collateral attacks on prior convictions under § 924(e). The statute's language—which applies to a defendant who has "three previous convictions" of the type specified—focuses on the *fact* of the conviction, and nothing therein suggests that the prior final conviction may be subject to attack for potential constitutional errors before it may be counted. That there is no implied right of collateral attack under § 924(e) is strongly supported by § 921(a)(20), which provides that a court may not count a conviction "which has been . . . set aside" by the jurisdiction in which the proceedings were held, and thereby creates a clear negative implication that courts *may* count a conviction that has *not* been so set aside; by the contrast between § 924(e) and other related statutes that expressly permit repeat offenders to challenge prior convictions that are used for enhancement purposes, see, *e. g.,* 21 U. S. C. § 851(c); and by *Lewis* v. *United States,* 445 U. S. 55, in which this Court held that one of the predecessors to the current felon-in-possession-of-a-firearm statute did not allow collateral attack on the predicate conviction. Pp. 490–493.

(b) The right, recognized in *Burgett* v. *Texas,* 389 U. S. 109, and *United States* v. *Tucker,* 404 U. S. 443, to collaterally attack prior convictions used for sentence enhancement purposes cannot be extended beyond the right, established in *Gideon* v. *Wainwright,* 372 U. S. 335, to have appointed counsel. Since *Johnson* v. *Zerbst,* 304 U. S. 458, and running through *Burgett* and *Tucker,* there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect. None of the constitutional violations alleged by Custis, including the claimed denial of effective assistance of counsel, rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all. This conclusion is supported by the interest in promoting the finality of judgments and avoiding delay and protraction of the federal sentencing process, and by the relative ease of administering a claim of failure to appoint counsel, as opposed to other constitutional challenges. Pp. 493–497.

2. However, Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas corpus review. See *Maleng* v. *Cook,* 490 U. S. 488, 492. If he is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. The Court expresses no opinion on the appropriate disposition of such an application. P. 497.

988 F. 2d 1355, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. SOUTER, J., filed a dissenting opinion, in which BLACKMUN and STEVENS, JJ., joined, *post,* p. 498.

Mary M. French argued the cause for petitioner. With her on the briefs were *James K. Bredar* and *Beth M. Farber.*

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris, John F. Manning,* and *Joseph C. Wyderko.**

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*Briefs of *amici curiae* urging affirmance were filed for the State of Ohio et al. by *Lee Fisher,* Attorney General of Ohio, *Richard A. Cordray,* State Solicitor, *Simon B. Karas,* and *Donald R. Jilisky* and *Donald Gary*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e) (ACCA), raises the penalty for possession of a firearm by a felon from a maximum of 10 years in prison to a mandatory minimum sentence of 15 years and a maximum of life in prison without parole if the defendant "has three previous convictions . . . for a violent felony or a serious drug offense." We granted certiorari to determine whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA. We hold that a defendant has no such right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions.

Baltimore City Police arrested petitioner Darren J. Custis on July 1, 1991. A federal grand jury indicted him on three counts: (1) possession of cocaine with intent to distribute in violation of 21 U. S. C. § 841(a)(1); (2) use of a firearm in connection with a drug trafficking offense in violation of 18 U. S. C. § 924(c); and (3) possession of a firearm by a convicted felon in violation of 18 U. S. C. § 922(g)(1). Before trial in the United States District Court for the District of Maryland, the Government notified Custis that it would seek an enhanced penalty for the § 922(g)(1) offense under § 924(e)(1). The notice charged that he had three prior felony convic-

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Keyser, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Winston Bryant* of Arkansas, *Larry EchoHawk* of Idaho, *Chris Gorman* of Kentucky, *Scott Harshbarger* of Massachusetts, *Frank J. Kelley* of Michigan, *Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Frank DeVesa* of New Jersey, *Heidi Heitkamp* of North Dakota, *Susan B. Loving* of Oklahoma, *Theodore R. Kulongoski* of Oregon, *Ernest D. Preate, Jr.*, of Pennsylvania, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Jeffrey L. Amestoy* of Vermont, *Stephen D. Rosenthal* of Virginia, and *Joseph B. Myer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

tions: (1) a 1985 Pennsylvania state-court conviction for robbery; (2) a 1985 Maryland state-court conviction for burglary; and (3) a 1989 Maryland state-court conviction for attempted burglary.

The jury found Custis not guilty of possession with intent to distribute and not guilty of use of a firearm during a drug offense, but convicted him of possession of a firearm and simple cocaine possession, a lesser included offense in the charge of possession with intent to distribute cocaine. At the sentencing hearing, the Government moved to have Custis' sentence enhanced under § 924(e)(1), based on the prior convictions included in the notice of sentence enhancement.

Custis challenged the use of the two Maryland convictions for sentence enhancement. He argued that his lawyer for his 1985 burglary conviction rendered unconstitutionally ineffective assistance and that his guilty plea was not knowing and intelligent as required by *Boykin* v. *Alabama,* 395 U. S. 238 (1969). He claimed that his attorney had failed to advise him of the defense of voluntary intoxication, and that he would have gone to trial, rather than pleaded guilty, had he been aware of that defense. He challenged his 1989 conviction on the ground that it had been based upon a "stipulated facts" trial. He claimed that such a "stipulated facts" trial was tantamount to a guilty plea and that his conviction was fundamentally unfair because he had not been adequately advised of his rights. Custis further asserts that he had been denied effective assistance of counsel in that case because the stipulated facts established only attempted breaking and entering rather than attempted burglary under state law.

The District Court initially rejected Custis' collateral attacks on his two Maryland state-court convictions. The District Court's letter ruling determined that the performance of Custis' attorney in the 1985 case did not fall below the standard of professional competence required under *Strickland* v. *Washington,* 466 U. S. 668 (1984). Order in

No. S 91–0334 (D. Md., Feb. 27, 1992), p. 1. It found that counsel's recommendation of a guilty plea was not unreasonable under the circumstances. *Id.*, at 2. The District Court also rejected Custis' claim that the 1989 "stipulated facts" trial was the functional equivalent of a guilty plea. *Id.*, at 2–3.

The District Court later reversed field and determined that it could not entertain Custis' challenges to his prior convictions at all. It noted that "[u]nlike the statutory scheme for enhancement of sentences in drug cases, [§ 924(e)(1)] provides no statutory right to challenge prior convictions relied upon by the Government for enhancement." 786 F. Supp. 533, 535–536 (Md. 1992). The District Court went on to state that the Constitution bars the use of a prior conviction for sentence enhancement only when there was a complete denial of counsel in the prior proceeding. *Id.*, at 536, citing *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *United States* v. *Tucker*, 404 U. S. 443 (1972); and *Burgett* v. *Texas*, 389 U. S. 109 (1967). Based on Custis' offense level of 33 and his criminal history category of VI, the District Court imposed a sentence of 235 months in prison.

The Court of Appeals affirmed. 988 F. 2d 1355 (CA4 1993). It recognized the right of a defendant who had been completely deprived of counsel to assert a collateral attack on his prior convictions since such a defendant "has lost his ability to assert all his other constitutional rights." *Id.*, at 1360, citing *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938). Citing the "substantial burden" on prosecutors and the district courts, the Court of Appeals dismissed all of Custis' challenges to his prior convictions as the "fact-intensive" type that pose a risk of unduly delaying and protracting the entire sentencing process. 988 F. 2d, at 1361. The prospect of such fact-intensive inquiries led it to express great reluctance at forcing district courts to overcome the " 'inadequacy or unavailability of state court records and witnesses' " in trying to determine the validity of prior sentences. *Ibid.*, quoting *United States* v. *Jones,* 977 F. 2d 105, 109 (CA4 1992). In addition to the practical hurdles, the Court of Appeals specified concerns over comity and federalism as other factors weighing against permitting collateral attacks. " 'Federal courts are not forums in which to relitigate state trials.' " 988 F. 2d, at 1361, quoting *Barefoot* v. *Estelle,* 463 U. S. 880, 887 (1983). We granted certiorari, 510 U. S. 913 (1993), because the Court of Appeals' decision conflicted with recent decisions from other Courts of Appeals that permitted defendants to challenge prior convictions that are used in sentencing under § 924(e)(1).[1]

Custis argues that the ACCA should be read to permit defendants to challenge the constitutionality of convictions used for sentencing purposes. Looking to the language of the statute, we do not believe § 924(e) authorizes such collateral attacks. The ACCA provides an enhanced sentence for any person who unlawfully possesses a firearm in violation of 18 U. S. C. § 922(g)[2] and "has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense . . . ." Section 924(e) applies whenever a defendant is found to have suffered "three previous convictions" of the type specified. The statute focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted.

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[1] See, *e. g., United States* v. *Paleo,* 967 F. 2d 7, 11 (CA1 1992); *United States* v. *Merritt,* 882 F. 2d 916, 918 (CA5 1989); *United States* v. *McGlocklin,* 8 F. 3d 1037 (CA6 1993) (en banc); *United States* v. *Gallman,* 907 F. 2d 639, 642–645 (CA7 1990); *United States* v. *Day,* 949 F. 2d 973, 981–983 (CA8 1991); *United States* v. *Clawson,* 831 F. 2d 909, 914–915 (CA9 1987); and *United States* v. *Franklin,* 972 F. 2d 1253, 1257–1258 (CA11 1992).

[2] Title 18 U. S. C. § 922 provides in pertinent part as follows:

"(g) It shall be unlawful for any person—

"(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

. . . . .

"to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Absent specific statutory authorization, Custis contends that an implied right to challenge the constitutionality of prior convictions exists under § 924(e). Again we disagree. The Gun Control Act of 1968, of which § 924(e) is a part, strongly indicates that unchallenged prior convictions may be used for purposes of § 924(e). At least for prior violent felonies, § 921(a)(20) describes the circumstances in which a prior conviction may be counted for sentencing purposes under § 924(e):

> "What constitutes a conviction of . . . a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter [18 U. S. C. §§ 921–930]."

The provision that a court may not count a conviction "which has been . . . set aside" creates a clear negative implication that courts *may* count a conviction that has *not* been set aside.

Congress' passage of other related statutes that expressly permit repeat offenders to challenge prior convictions that are used for enhancement purposes supports this negative implication. For example, 21 U. S. C. § 851(c), which Congress enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, sets forth specific procedures allowing a defendant to challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense. Section 851(c)(1) states that "[i]f the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information." Section 851(c)(2) goes on to provide:

> "A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge."

The language of § 851(c) shows that when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so. Congress' omission of similar language in § 924(e) indicates that it did not intend to give defendants the right to challenge the validity of prior convictions under this statute. Cf. *Gozlon-Peretz* v. *United States*, 498 U. S. 395, 404 (1991) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'"), quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted).

Our decision in *Lewis* v. *United States*, 445 U. S. 55 (1980), also supports the conclusion that prior convictions used for sentence enhancement purposes under § 924(e) are not subject to collateral attack in the sentence proceeding. *Lewis* interpreted 18 U. S. C. App. § 1202(a)(1) (1982 ed.), one of the predecessors to the current felon-in-possession-of-a-firearm statute. Section 1202(a)(1) was aimed at any person who "has been convicted by a court of the United States or of a State . . . of a felony." We concluded that "'[n]othing on the face of the statute suggests a congressional intent to limit its coverage to persons [whose convictions are not subject to collateral attack].'" 445 U. S., at 60, quoting *United States* v. *Culbert,* 435 U. S. 371, 373 (1978). This lack of such intent in § 1202(a)(1) also contrasted with other federal statutes that explicitly permitted a defendant to challenge the validity or constitutionality of the predicate felony. See, *e. g.,* 18 U. S. C. § 3575(e) (note following ch. 227) (dangerous special offender) and 21 U. S. C. § 851(c)(2) (recidivism under the Comprehensive Drug Abuse Prevention and Control Act of 1970). The absence of expressed intent, and the contrast with other federal statutes, led us to determine that "the firearms prosecution [under § 1202(a)(1)] does not open the predicate conviction to a new form of collateral attack." 445 U. S., at 67.

Similarly, § 924(e) lacks any indication that Congress intended to permit collateral attacks on prior convictions used for sentence enhancement purposes. The contrast between § 924(e) and statutes that expressly provide avenues for collateral attacks, as well as our decision in *Lewis, supra,* point strongly to the conclusion that Congress did not intend to permit collateral attacks on prior convictions under § 924(e).

Custis argues that regardless of whether § 924(e) permits collateral challenges to prior convictions, the Constitution requires that they be allowed. He relies upon our decisions in *Burgett* v. *Texas,* 389 U. S. 109 (1967), and *United States* v. *Tucker,* 404 U. S. 443 (1972), in support of this argument. Both of these decisions relied upon our earlier decision in *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), holding that the Sixth Amendment of the United States Constitution required that an indigent defendant in state-court proceedings have counsel appointed for him. *Gideon,* in turn, overruled our earlier decision in *Betts* v. *Brady,* 316 U. S. 455 (1942), which had held that the Sixth Amendment right to counsel, long applied in federal-court proceedings, was not itself made applicable to the States by the Due Process Clause. The

Due Process Clause, *Betts* had held, required the appointment of counsel for an indigent defendant in state courts only upon a showing of special circumstances. *Id.*, at 473.

But even before *Betts* v. *Brady* was decided, this Court had held that the failure to appoint counsel for an indigent defendant in a federal proceeding not only violated the Sixth Amendment, but was subject to collateral attack in federal habeas corpus. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). At a time when the underlying habeas statute was construed to allow collateral attacks on final judgments of conviction only where the rendering court lacked "jurisdiction"—albeit a somewhat expansive notion of "jurisdiction," see *Moore* v. *Dempsey*, 261 U. S. 86 (1923)—this Court attributed a jurisdictional significance to the failure to appoint counsel. The Court said:

> "If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. . . . The judgment of conviction pronounced by a court without jurisdiction is void, and one imprisoned thereunder may obtain release by *habeas corpus.*" 304 U. S., at 468.

When the Court later expanded the availability of federal habeas to other constitutional violations, it did so by frankly stating that the federal habeas statute made such relief available for them, without claiming that the denial of these constitutional rights by the trial court would have denied it jurisdiction. See, *e. g., Waley* v. *Johnston*, 316 U. S. 101, 104–105 (1942) (coerced confession); *Brown* v. *Allen*, 344 U. S. 443 (1953). There is thus a historical basis in our jurisprudence of collateral attacks for treating the right to have counsel appointed as unique, perhaps because of our oft-stated view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932).

Following our decision in *Gideon*, the Court decided *Burgett* v. *Texas, supra.* There the defendant was charged under a Texas recidivist statute with having been the subject of four previous felony convictions. 389 U. S., at 111. The prosecutor introduced certified records of one of the defendant's earlier convictions in Tennessee. *Id.*, at 112. The defendant objected to the admission of this conviction on the ground that he had not been represented by counsel and had not waived his right to counsel, but his objection was overruled by the trial court. *Id.*, at 113. This Court reversed, finding that the certified records of the Tennessee conviction on their face raised a "presumption that petitioner was denied his right to counsel . . . , and therefore that his conviction was void." *Id.*, at 114. The Court held that the admission of a prior criminal conviction that is constitutionally infirm under the standards of *Gideon* is inherently prejudicial and to permit use of such a tainted prior conviction for sentence enhancement would undermine the principle of *Gideon*. 389 U. S., at 115.

A similar situation arose in *Tucker, supra.* The defendant had been convicted of bank robbery in California in 1953. At sentencing, the District Court conducted an inquiry into the defendant's background, and, the record shows, gave explicit attention to the three previous felony convictions that the defendant had acknowledged at trial. The District Court sentenced him to 25 years in prison—the stiffest term authorized by the applicable federal statute, 18 U. S. C. §2113(d). 404 U. S., at 444. Several years later, after having obtained a judicial determination that two of his prior convictions were constitutionally invalid, the defendant filed a writ of habeas corpus in the District Court in which he had been convicted of bank robbery. He challenged the use at his 1953 bank robbery trial of his three previous felony convictions. This Court sustained his challenge insofar as his sentence was concerned, saying "*Gideon* . . . established an unequivocal rule 'making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one.'" *Id.*, at 449, quoting *Burgett* v. *Texas*, *supra*, at 114. The Court held that "[e]rosion of the *Gideon* principle can be prevented here only by affirming the judgment of the Court of Appeals remanding this case to the trial court for reconsideration of the [defendant's] sentence." 404 U. S., at 449.

Custis invites us to extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*. We decline to do so. We think that since the decision in *Johnson* v. *Zerbst* more than half a century ago, and running through our decisions in *Burgett* and *Tucker*, there has been a theme that failure to appoint counsel for an indigent defendant was a unique constitutional defect. Custis attacks his previous convictions claiming the denial of the effective assistance of counsel, that his guilty plea was not knowing and intelligent, and that he had not been adequately advised of his rights in opting for a "stipulated facts" trial. None of these alleged constitutional violations rises to the level of a jurisdictional defect resulting from the failure to appoint counsel at all. *Johnson* v. *Zerbst*, *supra*.

Ease of administration also supports the distinction. As revealed in a number of the cases cited in this opinion, failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States.

The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. *United States* v. *Addonizio,* 442 U. S. 178, 184, n. 11 (1979). We later noted in *Parke* v. *Raley,* 506 U. S. 20 (1992), that principles of finality associated with habeas corpus actions apply with at least equal force when a defendant seeks to attack a previous conviction used for sentencing. By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state-court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]." *Id.,* at 30. These principles bear extra weight in cases in which the prior convictions, such as one challenged by Custis, are based on guilty pleas, because when a guilty plea is at issue, "the concern with finality served by the limitation on collateral attack has special force." *United States* v. *Timmreck,* 441 U. S. 780, 784 (1979) (footnote omitted).

We therefore hold that § 924(e) does not permit Custis to use the federal sentencing forum to gain review of his state convictions. Congress did not prescribe and the Constitution does not require such delay and protraction of the federal sentencing process. We recognize, however, as did the Court of Appeals, see 988 F. 2d, at 1363, that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under § 924(e), may attack his state sentences in Maryland or through federal habeas review. See *Maleng* v. *Cook,* 490 U. S. 488, 492 (1989). If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentence enhanced by the state sentences. We express no opinion on the appropriate disposition of such an application.

The judgment of the Court of Appeals is accordingly

Affirmed.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN and JUSTICE STEVENS join, dissenting.

The Court answers a difficult constitutional question that I believe the underlying statute does not pose. Because in my judgment the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e) (ACCA), does not authorize sentence enhancement based on prior convictions that a defendant can show at sentencing to have been unlawfully obtained, I respectfully dissent.

I

A

The ACCA mandatory minimum sentence applies to defendants with "three previous convictions . . . for a violent felony or a serious drug offense." 18 U. S. C. § 924(e). The Court construes "convictio[n]" to refer to the "*fact* of the conviction," *ante,* at 491 (emphasis in original), and concludes that "Congress did not intend to permit collateral attacks [during sentencing] on prior convictions under § 924(e)," *ante,* at 493.[1] This interpretation of the ACCA will come as a surprise to the Courts of Appeals, which (with the one exception of the court below) have understood "convictio[n]" in the ACCA to mean "lawful conviction," and have permitted defendants to show at sentencing that a prior conviction offered for enhancement was unconstitutionally obtained, whether as violative of the right to have appointed counsel, see *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), the right to effective assistance of counsel, see *Strickland* v. *Washington,* 466 U. S. 668 (1984), the right against conviction based on an unknowing or involuntary guilty plea, see *Boykin* v.

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[1] The Court's opinion makes clear that it uses the phrase "collateral attack" to refer to an attack during sentencing. See, *e. g., ante,* at 487 ("We granted certiorari to determine whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA").

Alabama, 395 U. S. 238 (1969), or other constitutional rights.[2] The weight of appellate authority, in my opinion, reflects the proper construction of the ACCA.

The Court's contrary reading ignores the legal framework within which Congress drafted the ACCA, a framework with which we presume Congress was familiar. See, *e. g., Cannon* v. *University of Chicago,* 441 U. S. 677, 696–698 (1979). When the language that became the ACCA was first proposed in 1982, when it was enacted in 1984 (codified at § 1202(a)(1)) and when it was reenacted in 1986 (codified at § 924(e)), this Court's decisions in *Burgett* v. *Texas,* 389 U. S. 109 (1967), and *United States* v. *Tucker,* 404 U. S. 443 (1972), were on the books. Even under the narrow reading the Court accords those decisions today, they recognize at least a right to raise during sentencing *Gideon* challenges to prior convictions used for enhancement. See *ante,* at 495–496. Unless Congress intended to snub that constitutional right (and we ordinarily indulge a "strong presumption . . . that Congress legislated in accordance with the Constitution," *Textile Workers* v. *Lincoln Mills of Ala.,* 353 U. S. 448, 477 (1957) (Frankfurter, J., dissenting)), "convictio[n]" in § 924(e) simply cannot refer to the mere fact of conviction, and the provision must have been meant to allow during sentencing at least some challenges to prior convictions offered for enhancement.

Nor is it likely that Congress's intent was informed by as narrow a reading of *Burgett* and *Tucker* as the Court adopts today. In the legal environment of the ACCA's enactment, *Burgett* and *Tucker* were thought to stand for the broader proposition that "[n]o consideration can be given [at sentencing] to a conviction that was unconstitutionally obtained," 3 C. Wright, Federal Practice and Procedure § 526, p. 102 (1982), and Courts of Appeals consistently read the decisions as requiring courts to entertain claims that prior convictions relied upon for enhancement were unconstitutional for reasons other than *Gideon* violations.[3] The Congress that enacted the ACCA against this backdrop must be presumed to have intended to permit defendants to attempt to show at sentencing that prior convictions were "unconstitutionally obtained."

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[2] See *United States* v. *Paleo,* 967 F. 2d 7, 11–13 (Breyer, C. J.), rehearing denied, 9 F. 3d 988, 988–989 (CA1 1992) (containing additional discussion of statutory issue); *United States* v. *Preston,* 910 F. 2d 81, 87–89 (CA3 1990); *United States* v. *Taylor,* 882 F. 2d 1018, 1031 (CA6 1989); *United States* v. *Gallman,* 907 F. 2d 639, 642–643 (CA7 1990); *United States* v. *Day,* 949 F. 2d 973, 981–984 (CA8 1991); *United States* v. *Clawson,* 831 F. 2d 909, 914–915 (CA9 1987) (interpreting 18 U. S. C. § 1202(a)(1) (1982 ed.), the predecessor of § 924(e)); *United States* v. *Wicks,* 995 F. 2d 964, 974–979 (CA10 1993); *United States* v. *Ruo,* 943 F. 2d 1274, 1275–1277 (CA11 1991).

That presumption is strongly bolstered by the fact that Congress, despite the consistent interpretation of the ACCA as permitting attacks on prior convictions during sentencing, and despite amending the law several times since its enactment (see note following 18 U. S. C. § 924 (1988 ed. and Supp. V) (listing amendments)), left the language relevant here untouched. Congress's failure to express legislative disagreement with the appellate courts' reading of the ACCA cannot be disregarded, especially since Congress has acted in this area in response to other Courts of Appeals decisions that it thought revealed statutory flaws requiring "correct[ion]." S. Rep. No. 98–583, p. 7, and n. 17 (1984); see *id.*, at 8, and n. 18, 14, and n. 31; see also *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 385–386 (1983) ("In light of [a] well-established judicial interpretation [of a statutory provision], Congress' decision to leave [the provision] intact suggests that Congress ratified" the interpretation). Accordingly, absent clear indication that Congress intended to preclude all challenges during sentencing to prior convictions relied upon for enhancement, the ACCA must be read as permitting such challenges.

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[3] See, *e. g., United States* v. *Mancusi*, 442 F. 2d 561 (CA2 1971) (Confrontation Clause); *Jefferson* v. *United States*, 488 F. 2d 391, 393 (CA5 1974) (self-incrimination); *United States* v. *Martinez*, 413 F. 2d 61 (CA7 1969) (unknowing and involuntary guilty plea); *Taylor* v. *United States*, 472 F. 2d 1178, 1179–1180 (CA8 1973) (self-incrimination); *Brown* v. *United States*, 610 F. 2d 672, 674–675 (CA9 1980) (ineffective assistance of counsel); *Martinez* v. *United States*, 464 F. 2d 1289 (CA10 1972) (self-incrimination).

B

The Court fails to identify any language in the ACCA affirmatively precluding collateral attacks on prior convictions during sentencing, as there is none. Instead, the Court hears a clear message in the statutory silence, but I find none of its arguments persuasive. The Court first invokes 18 U. S. C. §921(a)(20), under which a conviction "which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter." According to the Court, this "exemption clause" (as we have elsewhere called it, see *Beecham* v. *United States, ante,* at 369, "creates a clear negative implication that courts *may* count a conviction that has *not* been set aside," *ante,* at 491. *Expressio unius,* in other words, *est exclusio alterius.*

Even if the premise of the Court's argument is correct,[4] the bridge the Court crosses to reach its conclusion is notoriously unreliable and does not bear the weight here. While "often a valuable servant," the maxim that the inclusion of something negatively implies the exclusion of everything else (*expressio unius,* etc.) is "a dangerous master to follow in the construction of statutes." *Ford* v. *United States,* 273 U. S. 593, 612 (1927) (internal quotation marks and citation omitted). It rests on the assumption that all omissions in legislative drafting are deliberate, an assumption we know to be false. See Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 813 (1983); Radin, Statutory Interpretation, 43 Harv. L. Rev. 863, 873–874 (1930). As a result, "[s]cholars have long savaged the *expressio* canon," *Cheney R. Co.* v. *ICC*, 902 F. 2d 66, 68 (CADC 1990) (Williams, J.), at least when it is made to do the work of a conclusive presumption, and our decisions support the proposition that "[s]ometimes [the canon] applies and sometimes it does not, and whether it does or does not depends largely on context." R. Dickerson, Interpretation and Application of Statutes 47 (1975); see also *id.*, at 234–235.

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[4] Despite the Court's unstated assumption to the contrary, a sentencing court that finds a prior conviction to have been unconstitutionally obtained can be said to have "set aside" the conviction for purposes of the sentencing, a reading that squares better than the Court's with the evident purpose of the exemption clause (as well as the statute that added it to §921(a)(20), the "Firearm Owner's Protection Act") of disregarding convictions that do not fairly and reliably demonstrate a person's bad character.

In this case, the "contemporary legal context," *Cannon* v. *University of Chicago*, 441 U. S., at 699, in which Congress drafted the ACCA requires rejecting the negative implication on which the Court relies. That context, as I have described, understood defendants to have a constitutional right to attack at sentencing prior convictions that had not previously been invalidated, and in that legal setting it would have been very odd for Congress to have intended to establish a constitutionally controversial rule by mere implication. See *Lowe* v. *SEC*, 472 U. S. 181, 206, n. 50 (1985) ("In areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties") (internal quotation marks and citation omitted). And in fact the legislative history indicates that quite a different intention informed the addition to § 921(a)(20) in 1986, two years after the ACCA's enactment, of the exemption clause (and the related "choice-of-law clause," *Beecham* v. *United States*, *ante*, at 369. Congress simply intended to clarify that the law of the convicting jurisdiction should be the principal reference point in determining what counts as a "conviction" for purposes of the federal "felon in possession" law, and to correct an oversight that had resulted in the omission of exemption language from one of two parallel provisions. See S. Rep. No. 98–583, *supra,* at 7; H. R. Rep. No. 99–495, p. 20 (1986). In amending § 921(a)(20), Congress was not addressing the question of where, in the course of federal litigation, a conviction could be challenged. Indeed, the legislative history of the amendment reveals no hint of any intention at all with respect to § 924(e)'s sentence-enhancement provision, but rather an exclusive focus on the federal firearms disability in § 922. Cf. *Miles* v. *Illinois Central R. Co.,* 315 U. S. 698, 714–715 (1942) (Frankfurter, J., dissenting) (relying on legislative history to counter a negative implication from a statute's text). As a result, the Court's argument by negative implication from § 921(a)(20)'s exemption clause must fail. The fact that Congress in the exemption clause expressly precluded reliance upon unconstitutional convictions that have been set aside simply does not reveal an intent with respect to § 924(e) to require reliance at sentencing on unconstitutional convictions that have not yet been set aside.

The Court's second statutory argument also seeks to establish congressional intent through negative implication, but is no more successful. The Court observes that Congress in other statutes expressly permitted challenges to prior convictions during sentencing, see *ante,* at 491–493 (citing 21 U. S. C. § 851(c)(2) and 18 U. S. C. § 3575(e)), which is said to show that "when Congress intended to authorize collateral attacks on prior convictions at the time of sentencing, it knew how to do so," *ante,* at 492. But surely the Court does not believe that, if Congress intended to preclude collateral attacks on prior convictions at the time of sentencing, it did not know how to do that. And again, the Court's effort to infer intent from the statutory silence runs afoul of the context of the statute's enactment; within a legal framework forbidding sentencing on the basis of prior convictions a defendant can show to be invalid, a Congress that intended to require sentencing on the basis of such convictions can be expected to have made its intention explicit.

Finally, the Court turns for support to *Lewis* v. *United States,* 445 U. S. 55 (1980), which held that the federal "felon in possession" law does not permit a defendant, during his prosecution, to challenge the constitutional validity of the predicate felony conviction. The Court's reliance on *Lewis,* however, assumes an equivalence between two different types of laws that *Lewis* itself disclaimed: between a law disabling convicted felons from possessing firearms (at issue in *Lewis*), and a law requiring sentence enhancement based on prior convictions (at issue here, as well as in *Burgett* and *Tucker*). *Lewis* explained that the "felon in possession" law is "a sweeping prophylaxis" designed "to keep firearms away from potentially dangerous persons," 445 U. S., at 63, 67, whereas a sentence-enhancement law "depend[s] upon the reliability of a past . . . conviction," *id.,* at 67. While the unlawfulness of a past conviction is irrelevant to the former, it is not to the latter, or so the *Lewis* Court thought in expressly distinguishing *Burgett* and *Tucker:* "[e]nforcement of [the federal gun disability] does not 'support guilt or enhance punishment' . . . on the basis of a conviction that is unreliable." 445 U. S., at 67 (quoting *Burgett,* 389 U. S., at 115).

Because of the material way in which a "felon in possession" law differs from a sentence-enhancement law, *Burgett* and *Tucker* were not part of the relevant legal backdrop against which Congress enacted the law interpreted in *Lewis,* and the *Lewis* Court could thus fairly presume that "conviction" in the statute before it was used as shorthand for "the fact of a felony conviction." 445 U. S., at 60, 67. As *Lewis* itself recognized, however, *Burgett* and *Tucker* are part of the backdrop against which sentence-enhancement laws are enacted, and against that backdrop Congress must be presumed to have used "conviction" in § 924(e) to mean "lawful conviction," and to have permitted defendants to show at sentencing that prior convictions offered for enhancement were unconstitutionally obtained.

II

A

Even if I thought the ACCA was ambiguous (the most the Court's statutory arguments could establish), I would resolve the ambiguity in petitioner's favor in accordance with the "'cardinal principle'" of statutory construction that "'this Court will first ascertain whether a construction of the statute is fairly possible by which [a constitutional] question may be avoided.'" *Ashwander* v. *TVA,* 297 U. S. 288, 348 (1936) (Brandeis, J., concurring) (quoting *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932)); see also *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council,* 485 U. S. 568, 575 (1988); *NLRB* v. *Catholic Bishop of Chicago,* 440 U. S. 490, 499–501, 504 (1979); *Blodgett* v. *Holden,* 275 U. S. 142, 148 (1927) (Holmes, J., concurring in result). The *Ashwander* principle, to be sure, comes into play only when the constitutional question to be avoided is a difficult one, but that designation easily fits the question that the Court's reading of the ACCA requires it to decide, the question whether the Constitution permits courts to enhance a defendant's sentence on the basis of a prior conviction the defendant can show was obtained in violation of his right to effective assistance of counsel, see *Strickland* v. *Washington,* 466 U. S. 668 (1984), or that the defendant can show was based on an unknowing or involuntary guilty plea, see *Boykin* v. *Alabama,* 395 U. S. 238 (1969).

This is a difficult question, for one thing, because the language and logic of *Burgett* and *Tucker* are hard to limit to claimed violations of the right, recognized in *Gideon* v. *Wainwright,* to have a lawyer appointed if necessary. As indicated by the uniformity of lower court decisions interpreting them, see *supra,* at 500, and n. 3, *Burgett* and *Tucker* are easily (if not best) read as announcing the broader principle that a sentence may not be enhanced by a conviction the defendant can show was obtained in violation of any "'specific federal right'" (or, as *Tucker* put it, that a sentence may not be "founded [even] in part upon misinformation of constitutional magnitude," 404 U. S., at 447) because to do so would be to allow the underlying right to be "denied anew" and to "suffer serious erosion," *Burgett, supra,* at 116 (citation omitted); see also *Tucker, supra,* at 449. The Court's references in both *Burgett* and *Tucker* to the right discussed in *Gideon* is hardly surprising; that was the "specific federal right" (and the record of the conviction obtained in violation of it the "misinformation of constitutional magnitude") that the defendants before it invoked. The opinions in both cases, moreover, made it quite clear that the discussion of *Gideon* was not meant to supply a limitation. *Burgett* described *Gideon* not as unique but as "illustrative of the limitations which the Constitution places on state criminal procedures," and it recounted as supportive of its holding cases involving coerced confessions, denials of the confrontation right, and illegal searches and seizures, 389 U. S., at 114; and *Tucker* made it clear that "the real question" before the Court was whether the defendant's sentence might have been different if the sentencing judge had known that the defendant's "previous convictions had been unconstitutionally obtained," 404 U. S., at 448.[5]

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[5] The notion that *Burgett* and *Tucker* stand for the narrow principle today's majority describes has escaped the Court twice before. In *Parke* v. *Raley,* 506 U. S. 20, 31 (1992), the Court rejected the argument that *Burgett* requires States to place the burden on the government during sentencing to prove the validity of prior convictions offered for enhancement. Though the underlying claim in *Raley* was the same as one of the claims here (that a prior conviction resulted from an invalid guilty plea), the Court did not hold *Burgett* inapposite as involving a violation of *Gideon* v. *Wainwright,* 372 U. S. 355 (1963), but rather accepted *Burgett*'s applicability and distinguished the case on different grounds. See 506 U. S., at 31. And in *Zant* v. *Stephens,* 462 U. S. 862 (1983), the Court described *Tucker* as holding that a "sentence must be set aside if the trial court

Even if, consistently with principles of *stare decisis, Burgett* and *Tucker* could be read as applying only to some class of cases defined to exclude claimed violations of *Strickland* or *Boykin,* the question whether to confine them so is not easily answered for purposes of the *Ashwander* rule. *Burgett* and *Tucker* deal directly with claimed violations of *Gideon,* and distinguishing for these purposes between violations of *Gideon* and *Strickland* would describe a very fine line. To establish a violation of the Sixth Amendment under *Strickland,* a defendant must show that "counsel's performance was deficient," and that "the deficient performance prejudiced the defense" in that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U. S., at 687. It is hard to see how such a defendant is any better off than one who has been denied counsel altogether, and why the conviction of such a defendant may be used for sentence enhancement if the conviction of one who has been denied counsel altogether may not. The Sixth Amendment guarantees no mere formality of appointment, but the "assistance" of counsel, cf. *Strickland, supra,* at 685, 686 ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the [Sixth Amendment]" because " 'the right to counsel is the right to the effective assistance of counsel' "), and whether the violation is of *Gideon* or *Strickland,* the defendant has been denied that constitutional right.

It is also difficult to see why a sentencing court that must entertain a defendant's claim that a prior conviction was obtained in violation of the Sixth Amendment's right to counsel need not entertain a defendant's claim that a prior conviction was based on an unknowing or involuntary guilty plea.

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relied at least in part on 'misinformation of constitutional magnitude' such as prior uncounseled convictions that were unconstitutionally imposed," 462 U. S., at 887, n. 23 (quoting *Tucker,* 404 U. S., at 447), clearly indicating an understanding that *Tucker* was not limited to *Gideon* violations.

That claim, if meritorious, would mean that the defendant was convicted despite invalid waivers of at least one of two Sixth Amendment rights (to trial by jury and to confront adverse witnesses) or of a Fifth Amendment right (against compulsory self-incrimination). See *Boykin,* 395 U. S., at 243. It is, to be sure, no simple task to prove that a guilty plea was the result of "[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats," *id.,* at 242–243, but it is certainly at least a difficult question whether a defendant who can make such a showing ought to receive less favorable treatment than the defendants in *Burgett* and *Tucker.*

Though the Court offers a theory for drawing a line between the right claimed to have been violated in *Burgett* and *Tucker* and the rights claimed to have been violated here, the Court's theory is itself fraught with difficulty. In the Court's view, the principle of *Burgett* and *Tucker* reaches only "constitutional violations ris[ing] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all." *Ante,* at 496 (citing *Johnson* v. *Zerbst,* 304 U. S. 458 (1938)). But nowhere in *Burgett* or *Tucker* is a distinction drawn between "jurisdictional" and "nonjurisdictional" rights, a fact giving no cause for surprise since long before (in *Waley* v. *Johnston,* 316 U. S. 101 (1942)) "the Court openly discarded the concept of jurisdiction—by then more a fiction than anything else—as a touchstone of the availability of federal habeas review." *Wainwright* v. *Sykes,* 433 U. S. 72, 79 (1977). Nor was *Johnson* v. *Zerbst,* on which the Court today places much reliance, a ringing endorsement of a jurisdiction theory. For many years prior to that case, "the concept of jurisdiction . . . was subjected to considerable strain," *Fay* v. *Noia,* 372 U. S. 391, 450 (1963) (Harlan, J., dissenting), and *Johnson* v. *Zerbst* was actually the very last case to mention the idea, offering just "token deference to the old concept that the [habeas] writ could only reach jurisdictional defects," Wechsler, Habeas Corpus and the

Supreme Court: Reconsidering the Reach of the Great Writ, 59 U. Colo. L. Rev. 167, 174 (1988).

In reviving the "jurisdiction" theory, the Court skips over the very difficulty that led to its abandonment, of devising a standard to tell whether or not a flaw in the proceedings leading to a conviction counts as a "jurisdictional defect." "Once the concept of 'jurisdiction' is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner" (as it must be if the concept is to reach *Gideon* violations) "it becomes a less than luminous beacon." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 470 (1963). Thus, if being denied appointed counsel is a "jurisdictional defect," why not being denied effective counsel (treated as an equivalent in *Strickland*)? If a conviction obtained in violation of the right to have appointed counsel suffers from a "jurisdictional defect" because the right's "purpose . . . is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights," *Johnson* v. *Zerbst, supra,* at 465, how distinguish a conviction based on a guilty plea resulting from a defendant's own ignorance of his legal and constitutional rights?[6] It was precisely due to the futility of providing principled answers to these questions that more than 50 years ago, and a quarter of a century before *Burgett* and *Tucker,* "[t]he Court finally abandoned the kissing of the jurisdictional book." P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1502 (3d ed. 1988). The Court nevertheless finds itself compelled to reembrace the concept of "jurisdictional defect," fraught as it is with difficulties, in order to answer the constitutional question raised by its reading of the ACCA. Because it is "fairly possible," *Ashwander,* 297 U. S., at 348, to construe the ACCA to avoid these difficulties and those associated with the other constitutional questions I have discussed, the *Ashwander* rule of restraint provides sufficient reason to reject the Court's construction of the ACCA.

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[6] Judge Friendly suggested that a convicting court lacks jurisdiction if "the criminal process itself has broken down [and] the defendant has not had the kind of trial the Constitution guarantees." Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 151 (1970). Would not this definition easily cover the *Strickland* and *Boykin* claims Custis sought to raise at sentencing?

B

The rule of lenity, "which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose," *Albernaz* v. *United States,* 450 U. S. 333, 342 (1981), drives me to the same conclusion. Though lenity is usually invoked when there is doubt about whether a legislature has criminalized particular conduct, "[the] policy of lenity [also] means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted); cf. *Bell* v. *United States,* 349 U. S. 81, 83 (1955) ("It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment"). Because I "cannot say with assurance," *United States* v. *Granderson, ante,* at 53, that Congress intended to require courts to enhance sentences on the basis of prior convictions a defendant can show to be invalid, the rule of lenity independently requires interpreting the ACCA to permit defendants to present such challenges to the sentencing judge before sentence is imposed.

C

The Court invokes "[e]ase of administration" to support its constitutional holding. *Ante,* at 496. While I doubt that even a powerful argument of administrative convenience would suffice to displace the *Ashwander* rule, cf. *Stanley* v. *Illinois*, 405 U. S. 645, 656 (1972), the burden argument here is not a strong one. The burdens of allowing defendants to challenge prior convictions at sentencing are not so severe, and are likely less severe than those associated with the alternative avenues for raising the very same claims.

For more than 20 years, as required by 21 U. S. C. §§ 851(c)(1) and (2), federal courts have entertained claims during sentencing under the drug laws that prior convictions offered for enhancement are "invalid" or were "obtained in violation of the Constitution," the unamended statute reflecting a continuing congressional judgment that any associated administrative burdens are justified and tolerable. For almost a decade, federal courts have done the same under the ACCA, see n. 2, *supra*, again without congressional notice of any judicial burden thought to require relief. See also *Parke* v. *Raley*, 506 U. S., at 32 ("In recent years state courts have permitted various challenges to prior convictions" during sentencing). As against this, the Court sees administrative burdens arising because "sentencing courts [would be required] to rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any of the 50 States." *Ante*, at 496. It would not be sentencing courts that would have to do this rummaging, however, but defendants seeking to avoid enhancement, for no one disagrees that the burden of showing the invalidity of prior convictions would rest on the defendants.

Whatever administrative benefits may flow from insulating sentencing courts from challenges to prior convictions will likely be offset by the administrative costs of the alternative means of raising the same claims. The Court acknowledges that an individual still in custody for a state conviction relied upon for enhancement may attack that conviction through state or federal habeas review and, if successful, "may . . . apply for reopening any federal sentence enhanced by the state sentences." *Ante,* at 497. And the Court does not disturb uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction. See J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure § 8.2, pp. 62–64, and n. 13.2, and § 8.4, p. 89, n. 27 (1993 Supp.) (collecting cases).[7] From the perspective of administrability, it strikes me as entirely sensible to resolve any challenges to the lawfulness of a predicate conviction in the single sentencing proceeding, especially since defendants there will normally be represented by counsel, who bring efficiency to the litigation (as well as equitable benefits).

III

Because I cannot agree that Congress has required federal courts to impose enhanced sentences on the basis of prior convictions a defendant can show to be constitutionally invalid, I respectfully dissent.

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[7] *Maleng* v. *Cook,* 490 U. S. 488 (1989), holding that a federal habeas court has jurisdiction to entertain a defendant's attack on a sentence to the extent it was enhanced by a prior, allegedly unconstitutional conviction, "express[ed] no view on the extent to which the [prior] conviction itself may be subject to challenge in the attack upon the . . . sentenc[e] which it was used to enhance." *Id.,* at 494 (citing 28 U. S. C. § 2254 Rule 9(a)). Court of Appeals decisions postdating *Maleng* have uniformly read it as consistent with the view that federal habeas courts may review prior convictions relied upon for sentence enhancement and grant appropriate relief. See *Collins* v. *Hesse,* 957 F. 2d 746, 748 (CA10 1992) (discussing *Maleng* and citing cases). In addition, depending on the circumstances, the writ of *coram nobis* may be available to challenge a prior conviction relied upon at sentencing, see *United States* v. *Morgan,* 346 U. S. 502 (1954); *Crank* v. *Duckworth,* 905 F. 2d 1090, 1091 (CA7 1990); *Lewis* v. *United States,* 902 F. 2d 576, 577 (CA7 1990), and, if successful, the defendant may petition the sentencing court for reconsideration of the enhanced sentence, see Restatement (Second) of Judgments § 16 (1982).

POSTERS 'N' THINGS, LTD., ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-903. Argued October 5, 1993—Decided May 23, 1994

Upon searching petitioner Acty's residence and the premises of her business, petitioner Posters 'N' Things, Ltd., officers seized, among other things, pipes, "bongs," scales, "roach clips," drug diluents, and advertisements describing various drug-related products sold by petitioners. Petitioners were indicted on, and convicted in the District Court of, a number of charges, including the use of an interstate conveyance as part of a scheme to sell drug paraphernalia in violation of former 21 U. S. C. § 857(a)(1), a provision of the Mail Order Drug Paraphernalia Control Act. In affirming, the Court of Appeals held, *inter alia,* that § 857 requires proof of scienter and that the Act is not unconstitutionally vague.

Held:

1. Section 857 requires proof of scienter. Section § 857(d)—which, among other things, defines "drug paraphernalia" as any equipment "primarily intended or designed for use" with illegal drugs—does not serve as the basis for a subjective-intent requirement on the part of the defendant, but merely establishes objective standards for determining what constitutes drug paraphernalia: The "designed for use" element refers to the manufacturer's design, while the "primarily intended . . . for use" standard refers generally to an item's likely use. However, neither this conclusion nor the absence of the word "knowingly" in § 857(d)'s text means that Congress intended to dispense entirely with a scienter requirement. Rather, § 857(a)(1) is properly construed under this Court's decisions as requiring the Government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs. It need not prove specific knowledge that the items are "drug paraphernalia" within the statute's meaning. Pp. 516-525.

2. Section 857 is not unconstitutionally vague as applied to petitioners, since § 857(d) is sufficiently determinate with respect to the items it lists as constituting *per se* drug paraphernalia, including many of the items involved in this case; since § 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia; and since the scienter requirement herein inferred assists in avoiding any vagueness problem. Because petitioners operated a full-scale "head shop" devoted

substantially to the sale of drug paraphernalia, the Court need not address §857's possible application to a legitimate merchant selling only items—such as scales, razor blades, and mirrors—that may be used for legitimate as well as illegitimate purposes. Pp. 525–526.

3. Petitioner Acty's other contentions are not properly before the Court. P. 527.

969 F. 2d 652, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 527.

Alfredo Parrish argued the cause for petitioners. With him on the brief was *Elizabeth Kruidenier.*

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Robert A. Long, Jr.,* and *Joel M. Gershowitz.*

JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we must address the scienter requirement of the Mail Order Drug Paraphernalia Control Act, Pub. L. 99–570, Tit. I, §1822, 100 Stat. 3207–51, formerly codified, as amended, at 21 U. S. C. §857, and the question whether the Act is unconstitutionally vague as applied to petitioners.

I

In 1977, petitioner Lana Christine Acty formed petitioner Posters 'N' Things, Ltd. (Posters), an Iowa corporation. The corporation operated three businesses, a diet-aid store, an art gallery, and a general merchandise outlet originally called "Forbidden Fruit," but later renamed "World Wide Imports." Law enforcement authorities received complaints that the merchandise outlet was selling drug paraphernalia. Other officers investigating drug cases found drug diluents (chemicals used to "cut" or dilute illegal drugs) and other drug paraphernalia that had been purchased from Forbidden Fruit.

In March 1990, officers executed warrants to search petitioners' business premises and Acty's residence. They seized various items, including pipes, bongs,[1] scales, roach clips,[2] and drug diluents including mannitol and inositol. The officers also seized cash, business records, and catalogs and advertisements describing products sold by petitioners. The advertisements offered for sale such products as "Coke Kits," "Free Base Kits,"[3] and diluents sold under the names "PseudoCaine" and "Procaine."

Indictments on a number of charges relating to the sale of drug paraphernalia eventually were returned against petitioners and George Michael Moore, Acty's husband. A joint trial took place before a jury in the United States District Court for the Southern District of Iowa.

Petitioners were convicted of using an interstate conveyance as part of a scheme to sell drug paraphernalia, in violation of former 21 U. S. C. § 857(a)(1), and of conspiring to commit that offense, in violation of 18 U. S. C. § 371. Petitioner Acty also was convicted of aiding and abetting the manufacture and distribution of cocaine, in violation of 21 U. S. C. § 841(a)(1); investing income derived from a drug offense, in violation of 21 U. S. C. § 854; money laundering, in violation of 18 U. S. C. § 1956(a)(1); and engaging in monetary transactions with the proceeds of unlawful activity, in violation of 18 U. S. C. § 1957. Acty was sentenced to imprisonment for 108 months, to be followed by a 5-year term of supervised release, and was fined $150,000. Posters was fined $75,000.

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[1] A "bong" is a "water pipe that consists of a bottle or a vertical tube partially filled with liquid and a smaller tube ending in a bowl, used often in smoking narcotic substances." American Heritage Dictionary 215 (3d ed. 1992).

[2] The statute defines "roach clips" as "objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand." 21 U. S. C. § 857(d)(5).

[3] The term "freebase" means "[t]o purify (cocaine) by dissolving it in a heated solvent and separating and drying the precipitate" or "[t]o use (cocaine purified in this way) by burning it and inhaling the fumes." American Heritage Dictionary 723 (3d ed. 1992).

The United States Court of Appeals for the Eighth Circuit affirmed the convictions. 969 F. 2d 652 (1992). Because of an apparent conflict among the Courts of Appeals as to the nature of the scienter requirement of former 21 U. S. C. § 857,[4] we granted certiorari. 507 U. S. 971 (1993).

II

Congress enacted the Mail Order Drug Paraphernalia Control Act as part of the Anti-Drug Abuse Act of 1986, Pub. L. 99–570, 100 Stat. 3207. As originally enacted, and as applicable in this case, the statute, 21 U. S. C. § 857(a),[5] provides:

> "It is unlawful for any person—
>
> "(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
>
> "(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
>
> "(3) to import or export drug paraphernalia."

Section 857(b) provides that anyone convicted under the statute shall be imprisoned for not more than three years and fined not more than $100,000.

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[4] Compare the decision of the Eighth Circuit in this case with *United States* v. *Mishra*, 979 F. 2d 301 (CA3 1992); *United States* v. *Murphy*, 977 F. 2d 503 (CA10 1992); *United States* v. *Schneiderman*, 968 F. 2d 1564 (CA2 1992), cert. denied, 507 U. S. 921 (1993); and *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F. 2d 955 (CA6), cert. denied, 493 U. S. 933 (1989).

[5] In 1990, Congress repealed § 857 and replaced it with 21 U. S. C. § 863 (1988 ed., Supp. IV). See Crime Control Act of 1990, Pub. L. 101–647, § 2401, 104 Stat. 4858. The language of § 863 is identical to that of former § 857 except in the general description of the offense. Section 863(a) makes it unlawful for any person "(1) to sell or offer for sale drug paraphernalia; (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or (3) to import or export drug paraphernalia."

A

Section 857(a) does not contain an express scienter requirement. Some courts, however, have located a scienter requirement in the statute's definitional provision, § 857(d), which defines the term "drug paraphernalia" as "any equipment, product, or material of any kind which is primarily intended or designed for use" with illegal drugs.[6] Petitioners argue that the term "primarily intended" in this provision establishes a subjective-intent requirement on the part of the defendant. We disagree, and instead adopt the Government's position that § 857(d) establishes objective standards for determining what constitutes drug paraphernalia.

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[6] Section 857(d) provides in full:

"The term 'drug paraphernalia' means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513) [21 U. S. C. §§ 801 et seq.]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as—

"(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

"(2) water pipes;

"(3) carburetion tubes and devices;

"(4) smoking and carburetion masks;

"(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

"(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

"(7) chamber pipes;

"(8) carburetor pipes;

"(9) electric pipes;

"(10) air-driven pipes;

"(11) chillums;

"(12) bongs;

"(13) ice pipes or chillers;

"(14) wired cigarette papers; or

"(15) cocaine freebase kits."

Section 857(d) identifies two categories of drug paraphernalia: items "primarily intended . . . for use" with controlled substances and items "designed for use" with such substances. This Court's decision in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U. S. 489, 500 (1982), governs the "designed for use" prong of § 857(d). In that case, the Court considered an ordinance requiring a license for the sale of items "designed or marketed for use with illegal cannabis or drugs," and concluded that the alternative "designed . . . for use" standard referred to "the design of the manufacturer, not the intent of the retailer or customer." *Id.*, at 501. An item is "designed for use," this Court explained, if it "is principally used with illegal drugs by virtue of its objective features, *i. e.*, features designed by the manufacturer." *Ibid.*

The objective characteristics of some items establish that they are designed specifically for use with controlled substances. Such items, including bongs, cocaine freebase kits, and certain kinds of pipes, have no other use besides contrived ones (such as use of a bong as a flower vase). Items that meet the "designed for use" standard constitute drug paraphernalia irrespective of the knowledge or intent of one who sells or transports them. See *United States* v. *Mishra*, 979 F. 2d 301, 308 (CA3 1992); *United States* v. *Schneiderman*, 968 F. 2d 1564, 1567 (CA2 1992), cert. denied, 507 U. S. 921 (1993). Accordingly, the "designed for use" element of § 857(d) does not establish a scienter requirement with respect to sellers such as petitioners.

The "primarily intended . . . for use" language of § 857(d) presents a more difficult problem. The language might be understood to refer to the state of mind of the defendant (here, the seller), and thus to require an intent on the part of the defendant that the items at issue be used with drugs. Some Courts of Appeals have adopted this construction, see

Mishra, 979 F. 2d, at 307; *United States* v. *Murphy*, 977 F. 2d 503, 506 (CA10 1992); *Schneiderman*, 968 F. 2d, at 1567; *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F. 2d 955, 957 (CA6), cert. denied, 493 U. S. 933 (1989), and this Court in *Hoffman Estates* interpreted the arguably parallel phrase "marketed for use" as describing "a retailer's intentional display and marketing of merchandise," 455 U. S., at 502, and thus requiring scienter. On the other hand, there is greater ambiguity in the phrase "primarily intended . . . for use" than in the phrase "marketed for use." The term "primarily intended" could refer to the intent of nondefendants, including manufacturers, distributors, retailers, buyers, or users. Several considerations lead us to conclude that "primarily intended . . . for use" refers to a product's likely use rather than to the defendant's state of mind.

First, the structure of the statute supports an objective interpretation of the "primarily intended . . . for use" standard. Section 857(d) states that drug paraphernalia "includes items primarily intended or designed for use in" consuming specified illegal drugs, "*such as* . . . ," followed by a list of 15 items constituting *per se* drug paraphernalia. The inclusion of the "primarily intended" term along with the "designed for use" term in the introduction to the list of *per se* paraphernalia suggests that at least some of the *per se* items could be "primarily intended" for use with illegal drugs irrespective of a particular defendant's intent—that is, as an objective matter. Moreover, § 857(e) lists eight objective factors that may be considered "in addition to all other logically relevant factors" in "determining whether an item constitutes drug paraphernalia."[7] These factors generally

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[7] Section 857(e) provides:

"In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

"(1) instructions, oral or written, provided with the item concerning its use;

focus on the actual use of the item in the community. Congress did not include among the listed factors a defendant's statements about his intent or other factors directly establishing subjective intent. This omission is significant in light of the fact that the parallel list contained in the Drug Enforcement Administration's Model Drug Paraphernalia Act, on which § 857 was based,[8] includes among the relevant factors "[s]tatements by an owner . . . concerning [the object's] use" and "[d]irect or circumstantial evidence of the intent of an owner . . . to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this Act."[9]

An objective construction of the definitional provision also finds support in § 857(f), which establishes an exemption for items "traditionally intended for use with tobacco products."[10] An item's "traditional" use is not based on the sub-

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"(2) descriptive materials accompanying the item which explain or depict its use;

"(3) national and local advertising concerning its use;

"(4) the manner in which the item is displayed for sale;

"(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

"(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

"(7) the existence and scope of legitimate uses of the item in the community; and

"(8) expert testimony concerning its use."

[8] See *Schneiderman*, 968 F. 2d, at 1566.

[9] See Brief for United States 6a–7a. The Model Act lists 14 factors to be considered in addition to all other logically relevant factors in determining whether an object is drug paraphernalia. Several of the factors are similar or identical to those listed in § 857(e).

[10] Section 857(f) provides:

"This section shall not apply to—

"(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

"(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, jective intent of a particular defendant. In 1988, Congress added the word "traditionally" in place of "primarily" in the §857(f) exemption in order to "clarif[y]" the meaning of the exemption. Pub. L. 100–690, Tit. VI, §6485, 102 Stat. 4384. Congress' characterization of the amendment as merely "clarifying" the law suggests that the original phrase—"primarily intended"—was not a reference to the fundamentally different concept of a defendant's subjective intent.

Finally, an objective construction of the phrase "primarily intended" is consistent with the natural reading of similar language in definitional provisions of other federal criminal statutes. See 18 U. S. C. §921(a)(17)(B) ("armor piercing ammunition" excludes any projectile that is "primarily intended" to be used for sporting purposes, as found by the Secretary of the Treasury); 21 U. S. C. §860(d)(2) (1988 ed., Supp. V) ("youth center" means a recreational facility "intended primarily for use by persons under 18 years of age").

We conclude that the term "primarily intended . . . for use" in §857(d) is to be understood objectively and refers generally to an item's likely use.[11] Rather than serving as the

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and traditionally intended for use with tobacco products, including any pipe, paper, or accessory."

[11] Although we describe the definition of "primarily intended" as "objective," we note that it is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features. Among the factors that are relevant to whether an item constitutes drug paraphernalia are "instructions, oral or written, provided with the item concerning its use," §857(e)(1), and "the manner in which the item is displayed for sale," §857(e)(4). Thus, while scales or razor blades as a general class may not be designed specifically for use with drugs, a subset of those items in a particular store may be "primarily intended" for use with drugs by virtue of the circumstances of their display and sale.

We disagree with JUSTICE SCALIA insofar as he would hold that a box of paper clips is converted into drug paraphernalia by the mere fact that a customer mentions to the seller that the paper clips will make excellent roach clips. Section 857(d) states that items "*primarily* intended" for use with drugs constitute drug paraphernalia, indicating that it is the likely basis for a subjective scienter requirement, the phrase "primarily intended or designed for use" in the definitional provision establishes objective standards for determining what constitutes drug paraphernalia.[12]

B

Neither our conclusion that Congress intended an objective construction of the "primarily intended" language in § 857(d), nor the fact that Congress did not include the word "knowingly" in the text of § 857, justifies the conclusion that Congress intended to dispense entirely with a scienter requirement. This Court stated in *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 438 (1978): "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." Even statutes creating public welfare offenses generally require proof that the defendant had knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct. See *Staples* v. *United States, post,* at 607, and n. 3;

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use of customers generally, not any particular customer, that can render a multiple-use item drug paraphernalia.

[12] The legislative history of the Mail Order Drug Paraphernalia Control Act consists of one House subcommittee hearing. See Hearing on H. R. 1625 before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. (1986). We recognize that a colloquy with the principal House sponsor of the Act during this hearing lends some support to a subjective interpretation of the "primarily intended" language of § 857(d). When asked to whose intent this language referred, Rep. Levine initially stated: "The purpose of the language . . . is to identify as clearly as possible the intent of manufacturer and the seller to market a particular item as drug paraphernalia, subject to the interpretation of a trial court." *Id.,* at 48. When pressed further, he stated: "[I]t would be the intent on the part of the defendant in a particular trial." *Ibid.* Given the language and structure of the statute, we are not persuaded that these comments of a single member at a subcommittee hearing are sufficient to show a desire on the part of Congress to locate a scienter requirement in the definitional provision of § 857.

United States v. *Dotterweich*, 320 U. S. 277, 281 (1943). We conclude that § 857 is properly construed as containing a scienter requirement.

We turn to the nature of that requirement in this statute. In *United States* v. *Bailey*, 444 U. S. 394, 404 (1980), this Court distinguished between the mental states of "'purpose'" and "'knowledge,'" explaining, *id.*, at 408, that, "except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction." In *Bailey*, the Court read into the federal escape statute, 18 U. S. C. § 751(a), a requirement that "an escapee knew his actions would result in his leaving physical confinement without permission," rejecting a heightened *mens rea* that would have required "'an intent to avoid confinement.'" 444 U. S., at 408. Similarly, in *United States* v. *United States Gypsum Co.*, 438 U. S., at 444, the Court addressed the question whether a criminal violation of the Sherman Act "requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the 'conscious object' of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow." The Court concluded that "action undertaken with knowledge of its probable consequences . . . can be a sufficient predicate for a finding of criminal liability under the antitrust laws." *Ibid.*

As in *Bailey* and *United States Gypsum*, we conclude that a defendant must act knowingly in order to be liable under § 857. Requiring that a seller of drug paraphernalia act with the "purpose" that the items be used with illegal drugs would be inappropriate. The purpose of a seller of drug paraphernalia is to sell his product; the seller is indifferent as to whether that product ultimately is used in connection with illegal drugs or otherwise. If § 857 required a purpose that the items be used with illegal drugs, individuals could avoid liability for selling bongs and cocaine freebase kits simply by establishing that they lacked the "conscious object" that the items be used with illegal drugs.

Further, we do not think that the knowledge standard in this context requires knowledge on the defendant's part that a particular customer actually will use an item of drug paraphernalia with illegal drugs. It is sufficient that the defendant be aware that customers in general are likely to use the merchandise with drugs. Therefore, the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs. Cf. *United States Gypsum,* 438 U. S., at 444 (knowledge of "probable consequences" sufficient for conviction).[13] A conviction under § 857(a)(1), then, requires the Government to prove that the defendant knowingly made use of an interstate conveyance as part of a scheme to sell items that he knew were likely to be used with illegal drugs.

Finally, although the Government must establish that the defendant knew that the items at issue are likely to be used with illegal drugs, it need not prove specific knowledge that the items are "drug paraphernalia" within the meaning of the statute. Cf. *Hamling* v. *United States,* 418 U. S. 87 (1974) (statute prohibiting mailing of obscene materials does not require proof that defendant knew the materials at issue met the legal definition of "obscenity"). As in *Hamling,* it is sufficient for the Government to show that the defendant "knew the character and nature of the materials" with which he dealt. *Id.,* at 123.

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[13] The knowledge standard that we adopt parallels the standard applied by those courts that have based § 857's scienter requirement on the "primarily intended" language of the definitional provision. See *Mishra,* 979 F. 2d, at 307 (Government must prove that defendant "contemplated, or reasonably expected under the circumstances, that the item sold or offered for sale would be used with illegal drugs"); *Schneiderman,* 968 F. 2d, at 1567 (Government must prove that defendant "knew there was a strong probability the items would be so used"); *57,261 Items of Drug Paraphernalia,* 869 F. 2d, at 957 (Government must prove defendant's "knowledge that there is a strong probability that the items will be used" with illegal drugs). The scienter requirement that we have inferred applies with respect to all items of drug paraphernalia, while at least some of the lower courts appear to have confined their scienter requirement to those items "primarily intended" (but not "designed") for use with illegal drugs. See, *e. g., Schneiderman,* 968 F. 2d, at 1567.

In light of the above, we conclude that the jury instructions given by the District Court adequately conveyed the legal standards for petitioners' convictions under § 857.[14]

III

Petitioners argue that § 857 is unconstitutionally vague as applied to them in this case. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson,* 461 U. S. 352, 357 (1983); see also *Grayned* v. *Rockford,* 408 U. S. 104, 108–109 (1972). Whatever its status as a general matter, we cannot say that § 857 is unconstitutionally vague as applied in this case.

First, the list of items in § 857(d) constituting *per se* drug paraphernalia provides individuals and law enforcement officers with relatively clear guidelines as to prohibited conduct. With respect to the listed items, there can be little doubt that the statute is sufficiently determinate to meet constitutional requirements. Many items involved in this case—including bongs, roach clips, and pipes designed for use with illegal drugs—are among the items specifically listed in § 857(d).

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[14] The District Court instructed the jury that, in order to find petitioners guilty, it was required to find that they "made use of [an] interstate conveyance knowingly as part of a scheme to sell drug paraphernalia," that "the items in question constitute drug paraphernalia," defined as items "primarily intended or designed for use" with illegal drugs, and that petitioners "knew the nature and character of the items." The District Court elaborated on the knowledge requirement, describing it as "knowledge of the defendants as to the nature, character, and use of the items being sold or offered for sale at the store." App. 16–35. We think that the instructions adequately informed the jury that it could convict petitioners only if it found that they knew that the items at issue were likely to be used with illegal drugs.

Second, § 857(e) sets forth objective criteria for assessing whether items constitute drug paraphernalia. These factors minimize the possibility of arbitrary enforcement and assist in defining the sphere of prohibited conduct under the statute. See *Mishra,* 979 F. 2d, at 309; *Schneiderman,* 968 F. 2d, at 1568. Section 857(f)'s exemption for tobacco-related products further limits the scope of the statute and precludes its enforcement against legitimate sellers of lawful products.

Finally, the scienter requirement that we have inferred in § 857 assists in avoiding any vagueness problem. "[T]he Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice . . . that [the] conduct is proscribed." *Hoffman Estates,* 455 U. S., at 499.

Section 857's application to multiple-use items—such as scales, razor blades, and mirrors—may raise more serious concerns. Such items may be used for legitimate as well as illegitimate purposes, and "a certain degree of ambiguity necessarily surrounds their classification." *Mishra,* 979 F. 2d, at 309. This case, however, does not implicate vagueness or other due process concerns with respect to such items. Petitioners operated a full-scale "head shop," a business devoted substantially to the sale of products that clearly constituted drug paraphernalia. The Court stated in *Hoffman Estates:* "The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine . . . is of no due process significance unless the possibility ripens into a prosecution." 455 U. S., at 503–504, n. 21. Similarly here, we need not address the possible application of § 857 to a legitimate merchant engaging in the sale of only multiple-use items.

IV

Petitioner Acty's other contentions are not properly before the Court. First, she argues that she was improperly convicted of aiding and abetting the manufacture and distribution of cocaine because the jury instructions created a "presumption" that certain items of drug paraphernalia "were intended for manufacturing with a controlled substance." Brief for Petitioners 17. This argument was neither raised in nor addressed by the Court of Appeals. See *Lawn* v. *United States*, 355 U. S. 339, 362–363, n. 16 (1958). Second, Acty asserts that her convictions for money laundering, investing income derived from a drug offense, and engaging in monetary transactions with the proceeds of unlawful activity must be reversed. These contentions were not presented in the petition for writ of certiorari, and therefore they are not properly raised here. See this Court's Rule 14.1(a). Finally, the petition presented the question whether the proof was adequate to support Acty's conviction for aiding and abetting the manufacture and distribution of cocaine; but petitioners' brief on the merits fails to address the issue and therefore abandons it. See *Russell* v. *United States*, 369 U. S. 749, 754, n. 7 (1962).

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

I agree with the Court that the sale of items likely to be used for drug purposes, with knowledge of such likely use, violates former 21 U. S. C. § 857; and that a subjective intent on the part of the defendant that the items sold be used for drug purposes is not necessary for conviction. That is all the scienter analysis necessary to decide the present case. The Court goes further, however, and says, *ante*, at 518–522, that such a subjective intent is not only not necessary for conviction but is not sufficient for conviction—*i. e.,* that the sale of an item with the *intent* that it be used for drug purposes does not constitute a violation. I disagree. In my view, the statutory language "primarily intended . . . for use" causes a sale to be a sale of drug paraphernalia where the seller intends the item to be used for drug purposes. A rejection of that view, if consistently applied, would cause "primarily intended or designed for use" to mean nothing more than "designed for use." While redundancy is not unheard of in statutory draftsmanship, neither is it favored in statutory interpretation. *Kungys* v. *United States,* 485 U. S. 759, 778 (1988).

Some of the provisions of § 857(e), which describes factors that may be considered in determining whether an item constitutes drug paraphernalia, clearly suggest that what is *not* covered paraphernalia by nature can be *made* such by the seller's intent.* Section 857(e)(1) lists as one of the relevant factors "instructions, oral or written, provided with the item concerning its use." This envisions, I think, that a drugstore owner who instructs the purchaser how to use the purchased drinking straw or razor blade in the ingestion of drugs converts what would otherwise be a lawful sale into a sale of drug paraphernalia. Section 857(e)(4) lists as a relevant factor "the manner in which the item is displayed for sale." That would surely not change the nature of the item, but it would cast light upon the use intended by the person who is selling and displaying it. And § 857(e)(5) lists as a relevant factor "whether the owner . . . is a legitimate sup-

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*For purposes of the present case, all we need decide is that the seller's intent will qualify. It would also seem true, however (since the statute contains no limitation on whose intent—manufacturer's, seller's, or buyer's—can qualify), that the *buyer's* intended use will cause an otherwise harmless item to be drug paraphernalia. To convict a seller on such a basis, of course, the scienter requirement of the statute would require that the seller have *known* of such intended use.

plier of like or related items." Again, that casts light upon nothing but the seller's intent regarding use.

On first glance, the Court's claim that "primarily intended" does not refer to the defendant's state of mind seems to be supported by § 857(f)(2), which exempts from the entire section the sale, "in the normal lawful course of business," of items "traditionally intended for use with tobacco products." This might be thought to suggest that the section applies only to categories of items, and not at all to items sold with a particular intent. On further consideration, however, it is apparent that § 857(f)(2) militates against, rather than in favor of, the Court's view. Unless unlawful intent could have produced liability, there would have been no *need* for the exception. Tobacco pipes are tobacco pipes, and cigarette paper is cigarette paper; neither could possibly meet the Court's test of being "items . . . likely to be used with illegal drugs," *ante*, at 524. Only the criminalizing effect of an unlawful *intent* to sell for drug use puts tobacconists at risk. Because of the ready (though not ordinary) use of items such as cigarette paper and tobacco pipes for drug purposes, tobacconists would have been in constant danger of being accused of having an unlawful intent in their sales—so Congress gave them what amounts to a career exception.

Through most of the Court's opinion, an item's "likely use" seems to refer to the objective features of the item that render it usable for one purpose or another. At the very end of the relevant discussion, however, in apparent response to the difficulties presented by the factors listed in § 857(e), one finds, in a footnote, the following:

> "Although we describe the definition of 'primarily intended' as 'objective,' we note that it is a relatively particularized definition, reaching beyond the category of items that are likely to be used with drugs by virtue of their objective features. . . . Thus, while scales or razor blades as a general class may not be designed specifi-

> cally for use with drugs, a subset of those items in a particular store may be 'primarily intended' for use with drugs by virtue of the circumstances of their display and sale." *Ante*, at 521, n. 11.

If by the "circumstances of . . . sale" the Court means to include the circumstance that the seller says, "You will find these scales terrific for weighing drugs," or that the buyer asks, "Do you have any scales suitable for weighing drugs?"—then there is really very little, if any, difference between the Court's position and mine. Intent can only be known, of course, *through* objective manifestations. If what the Court means by "a relatively particularized objective definition" is that all objective manifestations of the seller's intent are to be considered part of the "circumstances of sale," then there is no difference whatever between us (though I persist in thinking it would be simpler to say that "intended for sale" means "intended for sale" than to invent the concept of "a relatively particularized objective intent"). If, on the other hand, only some and not all objective manifestations of the seller's intent are to be considered part of the "circumstances of sale" (manner of display, for example, but not manner of oral promotion), then the Court ought to provide some description of those that do and those that do not, and (if possible) some reason for the distinction.

Finally, I cannot avoid noting that the only available legislative history—statements by the very Congressman who introduced the text in question, see *ante*, at 522, n. 12—unambiguously supports my view. I point that out, not because I think those statements are pertinent to our analysis, but because it displays once again that our acceptance of the supposed teachings of legislative history is more sporadic than our professions of allegiance to it. See *Thunder Basin Coal Co.* v. *Reich*, 510 U. S. 200, 219 (1994) (SCALIA, J., concurring in part and concurring in judgment); *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597, 617 (1991) (SCALIA, J., concurring in judgment).

BFP *v.* RESOLUTION TRUST CORPORATION, AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92–1370. Argued December 7, 1993—Decided May 23, 1994

Petitioner BFP took title to a California home subject to, *inter alia,* a deed of trust in favor of Imperial Savings Association. After Imperial entered a notice of default because its loan was not being serviced, the home was purchased by respondent Osborne for $433,000 at a properly noticed foreclosure sale. BFP soon petitioned for bankruptcy and, acting as a debtor in possession, filed a complaint to set aside the sale to Osborne as a fraudulent transfer, claiming that the home was worth over $725,000 when sold and thus was not exchanged for a "reasonably equivalent value" under 11 U. S. C. § 548(a)(2). The Bankruptcy Court granted summary judgment to Imperial. The District Court affirmed the dismissal, and a bankruptcy appellate panel affirmed the judgment, holding that consideration received in a noncollusive and regularly conducted nonjudicial foreclosure sale establishes "reasonably equivalent value" as a matter of law. The Court of Appeals affirmed.

Held: A "reasonably equivalent value" for foreclosed real property is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with. Pp. 535–549.

(a) Contrary to the positions taken by some Courts of Appeals, fair market value is not necessarily the benchmark against which determination of reasonably equivalent value is to be measured. It may be presumed that Congress acted intentionally when it used the term "fair market value" elsewhere in the Bankruptcy Code but not in § 548, particularly when the omission entails replacing standard legal terminology with a neologism. Moreover, fair market value presumes market conditions that, by definition, do not obtain in the forced-sale context, since property sold within the time and manner strictures of state-prescribed foreclosure is simply worth less than property sold without such restrictions. "Reasonably equivalent value" also cannot be read to mean a "reasonable" or "fair" forced-sale price, such as a percentage of fair market value. To specify a federal minimum sale price beyond what state foreclosure law requires would extend bankruptcy law well beyond the traditional field of fraudulent transfers and upset the coexistence that fraudulent transfer law and foreclosure law have enjoyed for over 400 years. While, under fraudulent transfer law, a "grossly inadequate price" raises a rebuttable presumption of actual fraudulent intent, it is black letter foreclosure law that, when a State's procedures are followed, the mere inadequacy of a foreclosure sale price is no basis for setting the sale aside. Absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with preexisting practice—the Court will not presume that Congress intended to displace traditional state regulation with an interpretation that would profoundly affect the important state interest in the security and stability of title to real property. Pp. 535–545.

(b) The conclusion reached here does not render § 548(a)(2) superfluous. The "reasonably equivalent value" criterion will continue to have independent meaning outside the foreclosure context, and § 548(a)(2) will continue to be an exclusive means of invalidating foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Pp. 545–546.

974 F. 2d 1144, affirmed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and GINSBURG, JJ., joined, *post*, p. 549.

Roy B. Woolsey argued the cause for petitioner. With him on the briefs was *Ronald B. Coulombe.*

Ronald J. Mann argued the cause for respondent Resolution Trust Corporation. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Jeffrey P. Minear, Joseph Patchan, Jeffrey Ehrlich,* and *Janice Lynn Green.*

Michael R. Sment argued the cause and filed a brief for respondent Osborne et al.*

**Marian C. Nowell, Henry J. Sommer, Gary Klein, Neil Fogarty,* and *Philip Shuchman* filed a brief for Frank Allen et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of Life Insurance et al. by *Christopher F. Graham, James L. Cunningham,* and *Richard E. Barnsback;* for the California Trustee's Association et al. by *Phillip M. Adleson, Patric J. Kelly,* and *Duane W. Shewaga;*

JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether the consideration received from a noncollusive, real estate mortgage foreclosure sale conducted in conformance with applicable state law conclusively satisfies the Bankruptcy Code's requirement that transfers of property by insolvent debtors within one year prior to the filing of a bankruptcy petition be in exchange for "a reasonably equivalent value." 11 U. S. C. § 548(a)(2).

I

Petitioner BFP is a partnership, formed by Wayne and Marlene Pedersen and Russell Barton in 1987, for the purpose of buying a home in Newport Beach, California, from Sheldon and Ann Foreman. Petitioner took title subject to a first deed of trust in favor of Imperial Savings Association (Imperial)[1] to secure payment of a loan of $356,250 made to the Pedersens in connection with petitioner's acquisition of the home. Petitioner granted a second deed of trust to the Foremans as security for a $200,000 promissory note. Subsequently, Imperial, whose loan was not being serviced, entered a notice of default under the first deed of trust and scheduled a properly noticed foreclosure sale. The foreclosure proceedings were temporarily delayed by the filing of an involuntary bankruptcy petition on behalf of petitioner. After the dismissal of that petition in June 1989, Imperial's

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for the Council of State Governments et al. by *Richard Ruda;* for the Federal Home Loan Mortgage Corporation et al. by *Dean S. Cooper, Roger M. Whelan, David F. B. Smith,* and *William E. Cumberland;* and for Jim Walter Homes, Inc., by *Lawrence A. G. Johnson.*

[1] Respondent Resolution Trust Corporation (RTC) acts in this case as receiver of Imperial Federal Savings Association (Imperial Federal), which was organized pursuant to a June 22, 1990, order of the Director of the Office of Thrift Supervision, and into which RTC transferred certain assets and liabilities of Imperial. The Director previously had appointed RTC as receiver of Imperial. For convenience we refer to all respondents other than RTC and Imperial as the private respondents.

foreclosure proceeding was completed at a foreclosure sale on July 12, 1989. The home was purchased by respondent Paul Osborne for $433,000.

In October 1989, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U. S. C. §§ 1101–1174. Acting as a debtor in possession, petitioner filed a complaint in Bankruptcy Court seeking to set aside the conveyance of the home to respondent Osborne on the grounds that the foreclosure sale constituted a fraudulent transfer under § 548 of the Code, 11 U. S. C. § 548. Petitioner alleged that the home was actually worth over $725,000 at the time of the sale to Osborne. Acting on separate motions, the Bankruptcy Court dismissed the complaint as to the private respondents and granted summary judgment in favor of Imperial. The Bankruptcy Court found, *inter alia,* that the foreclosure sale had been conducted in compliance with California law and was neither collusive nor fraudulent. In an unpublished opinion, the District Court affirmed the Bankruptcy Court's granting of the private respondents' motion to dismiss. A divided bankruptcy appellate panel affirmed the Bankruptcy Court's entry of summary judgment for Imperial. 132 B. R. 748 (1991). Applying the analysis set forth in *In re Madrid,* 21 B. R. 424 (Bkrtcy. App. Pan. CA9 1982), affirmed on other grounds, 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984), the panel majority held that a "non-collusive and regularly conducted nonjudicial foreclosure sale . . . cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes 'reasonably equivalent value' as a matter of law." 132 B. R., at 750.

Petitioner sought review of both decisions in the Court of Appeals for the Ninth Circuit, which consolidated the appeals. The Court of Appeals affirmed. *In re BFP,* 974 F. 2d 1144 (1992). BFP filed a petition for certiorari, which we granted. 508 U. S. 938 (1993).

II

Section 548 of the Bankruptcy Code, 11 U. S. C. § 548, sets forth the powers of a trustee in bankruptcy (or, in a Chapter 11 case, a debtor in possession) to avoid fraudulent transfers.[2] It permits to be set aside not only transfers infected by actual fraud but certain other transfers as well—so-called constructively fraudulent transfers. The constructive fraud provision at issue in this case applies to transfers by insolvent debtors. It permits avoidance if the trustee can establish (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) that the debtor received "less than a reasonably equivalent value in exchange for such transfer." 11 U. S. C. § 548(a)(2)(A). It is the last of these four elements that presents the issue in the case before us.

Section 548 applies to any "transfer," which includes "foreclosure of the debtor's equity of redemption." 11 U. S. C. § 101(54) (1988 ed., Supp. IV). Of the three critical terms "reasonably equivalent value," only the last is defined: "value" means, for purposes of § 548, "property, or satisfaction or securing of a . . . debt of the debtor," 11 U. S. C.

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[2] Title 11 U. S. C. § 548 provides in relevant part:

"(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

"(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

"(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

"(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . . ."

§ 548(d)(2)(A). The question presented here, therefore, is whether the amount of debt (to the first and second lienholders) satisfied at the foreclosure sale (viz., a total of $433,000) is "reasonably equivalent" to the worth of the real estate conveyed. The Courts of Appeals have divided on the meaning of those undefined terms. In *Durrett* v. *Washington Nat. Ins. Co.*, 621 F. 2d 201 (1980), the Fifth Circuit, interpreting a provision of the old Bankruptcy Act analogous to § 548(a)(2), held that a foreclosure sale that yielded 57% of the property's fair market value could be set aside, and indicated in dicta that any such sale for less than 70% of fair market value should be invalidated. *Id.*, at 203–204. This "*Durrett* rule" has continued to be applied by some courts under § 548 of the new Bankruptcy Code. See *In re Littleton*, 888 F. 2d 90, 92, n. 5 (CA11 1989). In *In re Bundles*, 856 F. 2d 815, 820 (1988), the Seventh Circuit rejected the *Durrett* rule in favor of a case-by-case, "all facts and circumstances" approach to the question of reasonably equivalent value, with a *rebuttable* presumption that the foreclosure sale price is sufficient to withstand attack under § 548(a)(2). 856 F. 2d, at 824–825; see also *In re Grissom*, 955 F. 2d 1440, 1445–1446 (CA11 1992). In this case the Ninth Circuit, agreeing with the Sixth Circuit, see *In re Winshall Settler's Trust*, 758 F. 2d 1136, 1139 (CA6 1985), adopted the position first put forward in *In re Madrid*, 21 B. R. 424 (Bkrtcy. App. Pan. CA9 1982), affirmed on other grounds, 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984), that the consideration received at a noncollusive, regularly conducted real estate foreclosure sale constitutes a reasonably equivalent value under § 548(a)(2)(A). The Court of Appeals acknowledged that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett* . . . and the Seventh Circuit in *Bundles*." 974 F. 2d, at 1148.

In contrast to the approach adopted by the Ninth Circuit in the present case, both *Durrett* and *Bundles* refer to fair market value as the benchmark against which determination of reasonably equivalent value is to be measured. In the context of an otherwise lawful mortgage foreclosure sale of real estate,[3] such reference is in our opinion not consistent with the text of the Bankruptcy Code. The term "fair market value," though it is a well-established concept, does not appear in § 548. In contrast, § 522, dealing with a debtor's exemptions, specifically provides that, for purposes of that section, " 'value' means fair market value as of the date of the filing of the petition." 11 U. S. C. § 522(a)(2). "Fair market value" also appears in the Code provision that defines the extent to which indebtedness with respect to an equity security is not forgiven for the purpose of determining whether the debtor's estate has realized taxable income. § 346(j)(7)(B). Section 548, on the other hand, seemingly goes out of its way to avoid that standard term. It might readily have said "received less than fair market value in exchange for such transfer or obligation," or perhaps "less than a reasonable equivalent of fair market value." Instead, it used the (as far as we are aware) entirely novel phrase "reasonably equivalent value." "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Chicago* v. *Environmental Defense Fund, ante,* at 338 (internal quotation marks omitted), and that presumption is even stronger when the omission entails the replacement of standard legal terminology with a neologism. One must suspect the language means that fair market value cannot—or at least cannot *always*—be the benchmark.

That suspicion becomes a certitude when one considers that market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very *antithesis* of forced-sale value. "The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property." Black's Law Dictionary 971 (6th ed. 1990). In short, "fair market value" presumes market conditions that, by definition, simply do not obtain in the context of a forced sale. See, *e. g., East Bay Municipal Utility District* v. *Kieffer,* 99 Cal. App. 240, 255, 278 P. 476, 482 (1929), overruled on other grounds by *County of San Diego* v. *Miller,* 13 Cal. 3d 684, 532 P. 2d 139 (1975) (in bank); *Nevada Nat. Leasing Co.* v. *Hereford,* 36 Cal. 3d 146, 152, 680 P. 2d 1077, 1080 (1984) (in bank); *Guardian Loan Co.* v. *Early,* 47 N. Y. 2d 515, 521, 392 N. E. 2d 1240, 1244 (1979).

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[3] We emphasize that our opinion today covers only mortgage foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different.

Neither petitioner, petitioner's *amici,* nor any federal court adopting the *Durrett* or the *Bundles* analysis has come to grips with this glaring discrepancy between the factors relevant to an appraisal of a property's market value, on the one hand, and the strictures of the foreclosure process on the other. Market value cannot be the criterion of equivalence in the foreclosure-sale context.[4] The language of § 548(a)(2)(A) ("received less than a reasonably equivalent value in exchange") requires judicial inquiry into whether the foreclosed property was sold for a price that approximated its worth at the time of sale. An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold within those strictures is simply *worth less.* No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).[5] Absent a clear statutory requirement to the contrary, we must assume the validity of this state-law regulatory background and take due account of its effect. "The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation." *Davies Warehouse Co.* v. *Bowles,* 321 U. S. 144, 154 (1944). Cf. *Gregory* v. *Ashcroft,* 501 U. S. 452, 460–462 (1991).

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[4] Our discussion assumes that the phrase "reasonably equivalent" means "approximately equivalent," or "roughly equivalent." One could, we suppose, torture it into meaning "as close to equivalent as can reasonably be expected"—in which event even a vast divergence from equivalent value would be permissible so long as there is good reason for it. On such an analysis, fair market value *could* be the criterion of equivalence, even in a forced-sale context; the forced sale would be the reason why gross inequivalence is nonetheless reasonable equivalence. Such word-gaming would deprive the criterion of all meaning. If "reasonably equivalent value" means only "as close to equivalent value as is reasonable," the statute might as well have said "reasonably infinite value."

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[5] We are baffled by the dissent's perception of a "patent" difference between zoning and foreclosure laws insofar as impact upon property value is concerned, *post,* at 557–558, n. 10. The only distinction we perceive is that the former constitute permanent restrictions upon use of the subject property, while the latter apply for a brief period of time and restrict only the manner of its sale. This difference says nothing about how significantly the respective regimes affect the property's value when they are operative. The dissent characterizes foreclosure rules as "merely procedural," and asserts that this renders them, unlike "substantive" zoning regulations, irrelevant in bankruptcy. We are not sure we agree with the characterization. But in any event, the cases relied on for this distinction all address creditors' attempts to claim the benefit of state rules of law (whether procedural or substantive) as property rights, in a bankruptcy proceeding. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 370–371 (1988); *Owen* v. *Owen,* 500 U. S. 305, 313 (1991); *United States* v. *Whiting Pools, Inc.,* 462 U. S. 198, 206–207, and nn. 14, 15 (1983). None of them declares or even intimates that state laws, procedural or otherwise, are irrelevant to prebankruptcy valuation questions such as that presented by § 548(a)(2)(A).

There is another artificially constructed criterion we might look to instead of "fair market price." One might judge there to be such a thing as a "reasonable" or "fair" forced-sale price. Such a conviction must lie behind the *Bundles* inquiry into whether the state foreclosure proceedings "were calculated . . . to return to the debtor-mortgagor his equity in the property." 856 F. 2d, at 824. And perhaps that is what the courts that follow the *Durrett* rule have in mind when they select 70% of fair market value as the outer limit of "reasonably equivalent value" for forecloseable property (we have no idea where else such an arbitrary percentage could have come from). The problem is that such judgments represent policy determinations that the Bankruptcy Code gives us no apparent authority to make. How closely the price received in a forced sale is likely to approximate fair market value depends upon the terms of the forced sale—how quickly it may be made, what sort of public notice must be given, etc. But the terms for foreclosure sale are not *standard.* They vary considerably from State to State, depending upon, among other things, how the particular State values the divergent interests of debtor and creditor. To specify a federal "reasonable" foreclosure-sale price is to extend federal bankruptcy law well beyond the traditional field of fraudulent transfers, into realms of policy where it has not ventured before. Some sense of history is needed to appreciate this.

The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated "covinous and fraudulent" transfers designed "to delay, hinder or defraud creditors and others." 13 Eliz., ch. 5 (1570). English courts soon developed the doctrine of "badges of fraud": proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent. See *Twyne's Case*, 3 Coke Rep. 80b, 76 Eng. Rep. 809 (K. B. 1601); O. Bump, Fraudulent Conveyances: A Treatise upon Conveyances Made by Debtors to Defraud Creditors 31–60 (3d ed. 1882). Every American bankruptcy law has incorporated a fraudulent transfer provision; the 1898 Act specifically adopted the language of the Statute of 13 Elizabeth. Bankruptcy Act of July 1, 1898, ch. 541, § 67(e), 30 Stat. 564–565.

The history of foreclosure law also begins in England, where courts of chancery developed the "equity of redemption"—the equitable right of a borrower to buy back, or redeem, property conveyed as security by paying the secured debt on a later date than "law day," the original due date. The courts' continued expansion of the period of redemption left lenders in a quandary, since title to forfeited property could remain clouded for years after law day. To meet this problem, courts created the equitable remedy of foreclosure: after a certain date the borrower would be forever foreclosed from exercising his equity of redemption. This remedy was called strict foreclosure because the borrower's entire interest in the property was forfeited, regardless of any accumulated equity. See G. Glenn, 1 Mortgages 3–18, 358–362, 395–406 (1943); G. Osborne, Mortgages 144 (2d ed. 1970). The next major change took place in 19th-century America, with the development of foreclosure by sale (with the surplus over the debt refunded to the debtor) as a means of avoiding the draconian consequences of strict foreclosure. *Id.*, at 661–663; Glenn, *supra*, at 460–462, 622. Since then, the States have created diverse networks of judicially and legislatively crafted rules governing the foreclosure process, to achieve what each of them considers the proper balance between the needs of lenders and borrowers. All States permit judicial foreclosure, conducted under direct judicial oversight; about half of the States also permit foreclosure by exercising a private power of sale provided in the mortgage documents. See Zinman, Houle, & Weiss, Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits, 39 Bus. Law. 977, 1004–1005 (1984). Foreclosure laws typically require notice to the defaulting borrower, a substantial lead time before the commencement of foreclosure proceedings, publication of a notice of sale, and strict adherence to prescribed bidding rules and auction procedures. Many States require that the auction be conducted by a government official, and some forbid the property to be sold for less than a specified fraction of a mandatory presale fair-market-value appraisal. See *id.*, at 1002, 1004–1005; Osborne, *supra,* at 683, 733–735; G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law 9, 446–447, 475–477 (1979). When these procedures have been followed, however, it is "black letter" law that mere inadequacy of the foreclosure sale price is no basis for setting the sale aside, though it may be set aside (*under state foreclosure law,* rather than fraudulent transfer law) if the price is so low as to "shock the conscience or raise a presumption of fraud or unfairness." Osborne, Nelson, & Whitman, *supra,* at 469; see also *Gelfert* v. *National City Bank of N. Y.,* 313 U. S. 221, 232 (1941); *Ballentyne* v. *Smith,* 205 U. S. 285, 290 (1907).

Fraudulent transfer law and foreclosure law enjoyed over 400 years of peaceful coexistence in Anglo-American jurisprudence until the Fifth Circuit's unprecedented 1980 decision in *Durrett.* To our knowledge no prior decision had ever applied the "grossly inadequate price" badge of fraud under fraudulent transfer law to set aside a foreclosure sale.[6] To say that the "reasonably equivalent value" language in the fraudulent transfer provision of the Bankruptcy Code requires a foreclosure sale to yield a certain minimum price beyond what state foreclosure law requires, is to say, in essence, that the Code has adopted *Durrett* or *Bundles.* Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy, U. S. Const., Art. I, § 8, cl. 4, to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance than the phrase "reasonably equivalent value"—a phrase entirely compatible with preexisting practice—we will not presume such a radical departure. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 380 (1988); *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection,* 474 U. S. 494, 501 (1986); cf. *United States* v. *Texas,* 507 U. S. 529, 534 (1993) (statutes that invade common law must be read with presumption favoring retention of long-established principles absent evident statutory purpose to the contrary).[7]

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[6] The only case cited by *Durrett* in support of its extension of fraudulent transfer doctrine, *Schafer* v. *Hammond,* 456 F. 2d 15 (CA10 1972), involved a direct sale, not a foreclosure.

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[7] We are unpersuaded by petitioner's argument that the 1984 amendments to the Bankruptcy Code codified the *Durrett* rule. Those amendments expanded the definition of "transfer" to include "foreclosure of the debtor's equity of redemption," 11 U. S. C. § 101(54) (1988 ed., Supp. IV), and added the words "voluntarily or involuntarily" as modifiers of the term "transfer" in § 548(a). The first of these provisions establishes that foreclosure sales fall within the general definition of "transfers" that may be avoided under several statutory provisions, including (but not limited to) § 548. See § 522(h) (transfers of exempt property), § 544 (transfers voidable under state law), § 547 (preferential transfers), § 549 (postpetition transfers). The second of them establishes that a transfer may be avoided as fraudulent even if it was against the debtor's will. See *In re Madrid,* 725 F. 2d 1197, 1199 (CA9 1984) (preamendment decision holding that a foreclosure sale is not a "transfer" under § 548). Neither of these consequences has any bearing upon the meaning of "reasonably equivalent value" in the context of a foreclosure sale.

Nor does our reading render these amendments "superfluous," as the dissent contends, *post,* at 555. Prior to 1984, it was at least open to ques-

Federal statutes impinging upon important state interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . [W]hen the Federal Government takes over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit." Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 539–540 (1947), quoted in *Kelly* v. *Robinson*, 479 U. S. 36, 49–50, n. 11 (1986). It is beyond question that an essential state interest is at issue here: We have said that "the general welfare of society is involved in the security of the titles to real estate" and the power to ensure that security "inheres in the very nature of [state] government." *American Land Co.* v. *Zeiss*, 219 U. S. 47, 60 (1911). Nor is there any doubt that the interpretation urged by petitioner would have a profound effect upon that interest: The title of every piece of realty purchased at foreclosure would be under a federally created cloud. (Already, title insurers have reacted to the *Durrett* rule by including specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales. See, *e. g.*, L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, pp. 5–18 to 5–19 (1992).) To displace traditional state regulation in such a manner, the federal statutory purpose must be "clear and manifest," *English* v. *General Elec. Co.*, 496 U. S. 72, 79 (1990). Cf. *Gregory* v. *Ashcroft*, 501 U. S., at 460–461.[8] Otherwise, the Bankruptcy

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tion whether § 548 could be used to invalidate even a *collusive* foreclosure sale, see *Madrid, supra*, at 1204 (Farris, J., concurring). It is no superfluity for Congress to clarify what had been at best unclear, which is what it did here by making the provision apply to involuntary as well as voluntary transfers and by including foreclosures within the definition of "transfer." See *infra*, at 545–546.

[8] The dissent criticizes our partial reliance on *Gregory* because the States' authority to "defin[e] and adjus[t] the relations between debtors and creditors . . . [cannot] fairly be called essential to their indepen-

Code will be construed to adopt, rather than to displace, pre-existing state law. See *Kelly, supra,* at 49; *Butner* v. *United States,* 440 U. S. 48, 54–55 (1979); *Vanston Bondholders Protective Comm.* v. *Green,* 329 U. S. 156, 171 (1946) (Frankfurter, J., concurring).

For the reasons described, we decline to read the phrase "reasonably equivalent value" in § 548(a)(2) to mean, in its application to mortgage foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

This conclusion does not render § 548(a)(2) superfluous, since the "reasonably equivalent value" criterion will continue to have independent meaning (ordinarily a meaning similar to fair market value) outside the foreclosure context. Indeed, § 548(a)(2) will even continue to be an exclusive means of invalidating some foreclosure sales. Although *collusive* foreclosure sales are likely subject to attack under § 548(a)(1), which authorizes the trustee to avoid transfers "made . . . with actual intent to hinder, delay, or defraud" creditors, that provision may not reach foreclosure sales that, while not intentionally fraudulent, nevertheless fail to comply with all governing state laws. Cf. 4 L. King, Collier on Bankruptcy ¶ 548.02, p. 548–35 (15th ed. 1993) (contrasting subsections (a)(1) and (a)(2)(A) of § 548). Any irregularity in the conduct of the sale that would permit judicial invalidation of the sale under applicable state law deprives the sale

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dence." *Post,* at 565, n. 17 (internal quotation marks omitted). This ignores the fact that it is not state authority over debtor-creditor law *in general* that is at stake in this case, but the essential sovereign interest in the security and stability of title to land. See *American Land Co.* v. *Zeiss,* 219 U. S. 47, 60 (1911).

price of its conclusive force under § 548(a)(2)(A), and the transfer may be avoided if the price received was not reasonably equivalent to the property's actual value at the time of the sale (which we think would be the price that would have been received if the foreclosure sale had proceeded according to law).

III

A few words may be added in general response to the dissent. We have no quarrel with the dissent's assertion that where the "meaning of the Bankruptcy Code's text is itself clear," *post,* at 566, its operation is unimpeded by contrary state law or prior practice. Nor do we contend that Congress must override historical state practice "expressly or not at all." *Post,* at 565. The Bankruptcy Code can of course override by implication when the implication is unambiguous. But where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation.

The dissent's insistence that here no doubt exists—that our reading of the statute is "in derogation of the *straightforward language* used by Congress," *post,* at 549 (emphasis added)—does not withstand scrutiny. The problem is not that we disagree with the dissent's proffered "plain meaning" of § 548(a)(2)(A) ("[T]he bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ('[un]reasonabl[y]') 'less than' the latter," *post,* at 552)—which indeed echoes our own framing of the question presented ("whether the amount of debt . . . satisfied at the foreclosure sale . . . is 'reasonably equivalent' to the worth of the real estate conveyed," *supra,* at 536). There is no doubt that this provision directs an inquiry into the relationship of the value received by the debtor to the worth of the property transferred. The problem, however, as any "ordinary speaker of English would have no difficulty grasping," *post,* at 552, is that this highly generalized re-formulation of the "plain meaning" of "reasonably equivalent value" continues to leave unanswered the one question central to this case, wherein the ambiguity lies: *What is a foreclosed property worth?* Obviously, until that is determined, we cannot know whether the value received in exchange for foreclosed property is "reasonably equivalent." We have considered three (not, as the dissent insists, only two, see *post,* at 549) possible answers to this question—fair market value, *supra,* at 536–540, reasonable forced-sale price, *supra,* at 540, and the foreclosure-sale price itself—and have settled on the last. We would have expected the dissent to opt for one of the other two, or perhaps even to concoct a fourth; but one searches JUSTICE SOUTER's opinion in vain for any alternative response to the question of the transferred property's worth. Instead, the dissent simply reiterates the "single meaning" of "reasonably equivalent value" (with which we entirely agree): "[A] court should discern the 'value' of the property transferred and determine whether the price paid was, under the circumstances, 'less than reasonabl[e].'" *Post,* at 559. Well and good. But what *is* the "value"? The dissent has no response, evidently thinking that, in order to establish that the law is clear, it suffices to show that "the eminent sense of the natural reading," *post,* at 565, provides an unanswered question.

Instead of answering the question, the dissent gives us hope that someone else will answer it, exhorting us "to believe that [bankruptcy courts], familiar with these cases (and with local conditions) as we are not, will give ["reasonably equivalent value"] sensible content in evaluating particular transfers on foreclosure." *Post,* at 560. While we share the dissent's confidence in the capabilities of the United States Bankruptcy Courts, it is the proper function of *this* Court to give "sensible content" to the provisions of the United States Code. It is surely the case that bankruptcy "courts regularly make . . . determinations about the 'reasonably equivalent value' of assets transferred through other means than foreclosure sales." *Post,* at 560. But in the vast majority of those cases, they can refer to the traditional common-law notion of fair market value as the benchmark. As we have demonstrated, this generally useful concept simply has no application in the foreclosure-sale context, *supra,* at 536–540.

Although the dissent's conception of what constitutes a property's "value" is unclear, it does *seem* to take account of the fact that the property is subject to forced sale. The dissent refers, for example, to a reasonable price "under the circumstances," *post,* at 559, and to the "worth of the item *when sold,*" *post,* at 552 (emphasis added). But just as we are never told how the broader question of a property's "worth" is to be answered, neither are we informed how the lesser included inquiry into the impact of forced sale is to be conducted. Once again, we are called upon to have faith that bankruptcy courts will be able to determine whether a property's foreclosure-sale price falls unreasonably short of its "optimal value," *post,* at 559, whatever that may be. This, the dissent tells us, is the statute's plain meaning.

We take issue with the dissent's characterization of our interpretation as carving out an "exception" for foreclosure sales, *post,* at 549, or as giving "two different and inconsistent meanings," *post,* at 557, to "reasonably equivalent value." As we have emphasized, the inquiry under § 548(a)(2)(A)—whether the debtor has received value that is substantially comparable to the worth of the transferred property—is the same for all transfers. But as we have also explained, the fact that a piece of property is legally subject to forced sale, like any other fact bearing upon the property's use or alienability, necessarily affects its worth. *Unlike* most other legal restrictions, however, foreclosure has the effect of completely redefining the market in which the property is offered for sale; normal free-market rules of exchange are replaced by the far more restrictive rules governing forced sales. Given this altered reality, and the concomitant inutility of the normal tool for determining what property is worth (fair market value), the only legitimate evidence of the property's value at the time it is sold is the foreclosure-sale price itself.

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For the foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE GINSBURG join, dissenting.

The Court today holds that by the terms of the Bankruptcy Code Congress intended a peppercorn paid at a noncollusive and procedurally regular foreclosure sale to be treated as the "reasonabl[e] equivalent" of the value of a California beachfront estate. Because the Court's reasoning fails both to overcome the implausibility of that proposition and to justify engrafting a foreclosure-sale exception onto 11 U. S. C. § 548(a)(2)(A), in derogation of the straightforward language used by Congress, I respectfully dissent.

I

A

The majority presents our task of giving meaning to § 548(a)(2)(A) in this case as essentially entailing a choice between two provisions that Congress might have enacted, but did not. One would allow a bankruptcy trustee to avoid a recent foreclosure-sale transfer from an insolvent debtor whenever anything less than fair market value was obtained, while the second would limit the avoidance power to cases where the foreclosure sale was collusive or had failed to comply with state-prescribed procedures. The Court then argues that, given the unexceptionable proposition that forced sales rarely yield as high a price as sales held under ideal, "market" conditions, Congress's "omission" from

§ 548(a)(2)(A) of the phrase "fair market value" means that the latter, narrowly procedural reading of § 548(a)(2)(A) is the preferable one.

If those in fact were the interpretive alternatives, the majority's choice might be a defensible one.[1] The first, equating "reasonably equivalent value" at a foreclosure sale with "fair market value" has little to recommend it. Forced-sale prices may not be (as the majority calls them) the "very *antithesis*" of market value, see *ante,* at 537, but they fail to bring in what voluntary sales realize, and rejecting such a reading of the statute is as easy as statutory interpretation is likely to get. On the majority's view, laying waste to this straw man necessitates accepting as adequate value whatever results from noncollusive adherence to state foreclosure requirements. Because properties are "simply *worth less*," *ante*, at 539, on foreclosure sale, the Court posits, they must have been "worth" whatever price was paid. That, however, is neither a plausible interpretation of the statute, nor its only remaining alternative reading.[2]

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[1] I note, however, two preliminary embarrassments: first, the gloss on § 548(a)(2)(A) the Court embraces is less than entirely hypothetical. In the course of amending the Bankruptcy Code in 1984, see *infra,* at 554, Congress considered, but did not enact, an amendment that said precisely what the majority now says the current provision means, *i. e.,* that the avoidance power is confined to foreclosures involving collusion or procedural irregularity. See S. 445, 98th Cong., 1st Sess., § 360 (1983). Even if one is careful not to attach too much significance to such a legislative nonoccurrence, it surely cautions against undue reliance on a different, entirely speculative congressional "omission." See *ante,* at 537 (the statute "seemingly goes out of its way to avoid" using "fair market value"); but cf. *ante,* at 545 (reasonably equivalent value will "continue" to have a meaning "similar to fair market value" outside the foreclosure-sale context).

In this case, such caution would be rewarded. While the assertedly "standard," *ante,* at 537, phrase "fair market value" appears in more than 150 distinct provisions of the Tax Code, it figures in only two Bankruptcy Code provisions, one of which is entitled, suggestively, "Special tax provisions." See 11 U. S. C. § 346. The term of choice in the bankruptcy setting seems to be "value," unadorned and undefined, which appears in more than 30 sections of the Bankruptcy Code, but which is, with respect to many of them, read to mean "fair market value." See also § 549(c) ("present fair equivalent value"); § 506(a) ("value [is to] be determined in light of the purpose of the valuation and of the proposed disposition or use of such property"); S. Rep. No. 95–989, p. 54 (1978) ("[M]atters [of valuation under § 361] are left to case-by-case interpretation and development. . . . Value [does not] mean, in every case, forced sale liquidation value or full going concern value. There is wide latitude between those two extremes . . ."). To the extent, therefore, that this negative implication supplies ground to "suspect," see *ante,* at 537, that Congress could not have meant what the statute says, such suspicion is misplaced.

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[2] The majority's statutory argument depends similarly heavily on the success of its effort to relegate "fair market value" to complete pariah status. But it is no short leap from the (entirely correct) observation that a property's fair market value will not be dispositive of whether "less than a reasonably equivalent value" was obtained on foreclosure to the assertion that market value has "no applicability," *ante*, at 537, or *is not "legitimate evidence," ante*, at 549 (emphasis added), of whether the statutory standard was met. As is explored more fully *infra*, the assessed value of a parcel of real estate at the time of foreclosure sale is not to be ignored. On the contrary, that figure plainly is relevant to the Bankruptcy Code determination, both because it provides a proper measure of the rights received by the transferee and because it is indicative of the extent of the debtor's equity in the property, an asset which, but for the prebankruptcy transfer under review, would have been available to the bankruptcy estate, see *infra*, at 562–565.

It is also somewhat misleading, similarly, to suggest that "[n]o one would pay as much," *ante*, at 539, for a foreclosed property as he would for the same real estate purchased under leisurely, market conditions. Buyers no doubt hope for bargains at foreclosure sales, but an investor with a million dollars cash in his pocket might be ready to pay "as much" for a desired parcel of property on forced sale, at least if a rival, equally determined millionaire were to appear at the same auction. The principal reason such sales yield low prices is not so much that the properties become momentarily *"worth less," ibid.* (on the contrary, foreclosure-sale purchasers receive a bundle of rights essentially similar to what they get when they buy on the market) or that foreclosing mortgagees are under the compulsion of state law to make no more than the most desultory efforts to encourage higher bidding, but rather that such free-spending millionaires are in short supply, and those who do exist are unlikely to read the fine print which fills the "legal notice" columns of their morning newspaper. Nor, similarly, is market value justly known as the "antithesis" of

The question before the Court is whether the price received at a foreclosure sale after compliance with state procedural rules in a noncollusive sale must be treated conclusively as the "reasonably equivalent value" of the mortaged property and in answering that question, the words and meaning of § 548(a)(2)(A) are plain. See *Patterson* v. *Shumate*, 504 U. S. 753, 760 (1992) (party seeking to defeat plain meaning of Bankruptcy Code text bears an "exceptionally heavy burden") (internal quotation marks omitted); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979) (statutory words should be given their ordinary meaning). A trustee is authorized to avoid certain recent prebankruptcy transfers, including those on foreclosure sales, that a bankruptcy court determines were not made in exchange for "a reasonably equivalent value." Although this formulation makes no pretense to mathematical precision, an ordinary speaker of English would have no difficulty grasping its basic thrust: the bankruptcy court must compare the price received by the insolvent debtor and the worth of the item when sold and set aside the transfer if the former was substantially ("[un]reasonabl[y]") "less than" the latter.[3] Nor would any ordinary English speaker, concerned to determine whether a foreclosure sale was collusive or procedurally irregular (an enquiry going exclusively to the process by which a transaction was consummated), direct an adjudicator, as the Court now holds Congress did, to ascertain whether the sale had realized "less than a reasonably equivalent value" (an enquiry described in quintessentially substantive terms).[4]

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foreclosure-sale price, for the important (if intuitive) reason that properties with higher market values can be expected to sell for more on foreclosure.

[3] Indeed, it is striking that this is what the Court says the statute (probably) does mean, with respect to almost every transfer other than a sale of property upon foreclosure. See *ante*, at 545.

[4] The Court protests, *ante*, at 546, that its formulation, see *ante*, at 536, deviates only subtly from the reading advanced here and purports not to disagree that the statute compels an enquiry "into the relationship of the

Closer familiarity with the text, structure, and history of the disputed provision (and relevant amendments) confirms the soundness of the plain reading. Before 1984, the question whether foreclosure sales fell within bankruptcy courts' power to set aside transfers for "too little in return" was, potentially, a difficult one. Then, it might plausibly have been contended that § 548 was most concerned with "fraudulent" conduct by debtors on the brink of bankruptcy, misbehavior unlikely to be afoot when an insolvent debtor's property is sold, against his wishes, at foreclosure.[5] Indeed, it could further have been argued, again consonantly with the text of the earlier version of the Bankruptcy Code, that Congress had not understood foreclosure to involve a "transfer" within the ambit of § 548, see, *e. g., Abramson* v. *Lakewood Bank & Trust Co.*, 647 F. 2d 547, 549 (CA5 1981) (Clark, J.,

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value received and the worth of the property transferred," *ante*, at 546. Reassuring as such carefully chosen words may sound, they cannot obscure the fact that the "comparison" the majority envisions is an empty ritual. See n. 10, *infra*.

[5] The Court notes correctly that fraudulent conveyance laws were directed first against insolvent debtors' passing assets to friends or relatives, in order to keep them beyond their creditors' reach (the proverbial "Elizabethan deadbeat who sells his sheep to his brother for a pittance," see Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829, 852 (1985)), and then later against conduct said to carry the "badges" of such misconduct, but bankruptcy law had, well before 1984, turned decisively away from the notion that the debtor's state of mind, and not the objective effects on creditors, should determine the scope of the avoidance power. Thus, the 1938 Chandler Act, Bankruptcy Revision, provided that a transfer could be set aside without proving any intent to "hinder, delay, or defraud," provided that the insolvent debtor obtained less than "fair consideration" in return, see 11 U. S. C. § 107(d)(2) (1976), and the 1978 Bankruptcy Code eliminated scrutiny of the transacting parties' "good faith." Cf. 11 U. S. C. § 107(d)(1)(e) (1976). At the time when bankruptcy law was more narrowly concerned with debtors' turpitude, moreover, the available "remedies" were strikingly different, as well. See, *e. g.*, 21 Jac. I., ch. 19, § 6 (1623), 4 Statutes of the Realm 1228 (insolvent debtor who fraudulently conceals assets is subject to have his ear nailed to pillory and cut off).

dissenting) (Bankruptcy Act case), cert. denied, 454 U. S. 1164 (1982), on the theory that the "transfer" from mortgagor to mortgagee occurs, once and for all, when the security interest is first created. See generally *In re Madrid,* 725 F. 2d 1197 (CA9), cert. denied, 469 U. S. 833 (1984).

In 1984, however, Congress pulled the rug out from under these previously serious arguments, by amending the Code in two relevant respects. See Bankruptcy Amendments and Federal Judgeship Act of 1984, §§401(1), 463(a), 98 Stat. 366, 378. One amendment provided expressly that "involuntar[y]" transfers are no less within the trustee's §548 avoidance powers than "voluntar[y]" ones, and another provided that the "foreclosure of the debtor's equity of redemption" itself is a "transfer" for purposes of bankruptcy law. See 11 U. S. C. §101(54) (1988 ed., Supp. IV).[6] Thus, whether or not one believes (as the majority seemingly does not) that foreclosure sales rightfully belong within the historic domain of "fraudulent conveyance" law, that is exactly where Congress has now put them, cf. *In re Ehring,* 900 F. 2d 184, 187 (CA9 1990), and our duty is to give effect to these new amendments, along with every other clause of the Bankruptcy Code. See, *e. g., United States* v. *Nordic Village, Inc.,* 503 U. S. 30, 36 (1992); *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 374–375 (1988); see also *Dewsnup* v. *Timm,* 502 U. S. 410, 426 (1992) (SCALIA, J., dissenting). The Court's attempt to escape the plain effect of § 548(a)(2)(A) opens it to some equally plain objections.

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[6] As noted at n. 1, *supra,* an earlier version of the Senate bill contained a provision that would have added to §548 the conclusive presumption the Court implies here. See S. 445, 98th Cong., 1st Sess., §360 (1983) ("A secured party or third party purchaser who obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure, power of sale, or other proceeding or provision of nonbankruptcy law permitting or providing for the realization of security upon default of the borrower under a mortgage, deed of trust, or other security agreement takes for reasonably equivalent value within the meaning of this section"). The provision was deleted from the legislation enacted by Congress.

The first and most obvious of these objections is the very enigma of the Court's reading. If a property's "value" is conclusively presumed to be whatever it sold for, the "less than reasonabl[e] equivalen[ce]" question will never be worth asking, and the bankruptcy avoidance power will apparently be a dead letter in reviewing real estate foreclosures. Cf. 11 U. S. C. § 361(3) ("indubitable equivalent").[7] The Court answers that the section is not totally moribund: it still furnishes a way to attack collusive or procedurally deficient real property foreclosures, and it enjoys a vital role in authorizing challenges to other transfers than those occurring on real estate foreclosure. The first answer, however, just runs up against a new objection. If indeed the statute fails to reach noncollusive, procedurally correct real estate foreclosures, then the recent amendments discussed above were probably superfluous. There is a persuasive case that collusive or seriously irregular real estate sales were already subject to avoidance in bankruptcy, see, *e. g.*, *In re Worcester*, 811 F. 2d 1224, 1228, 1232 (CA9 1987) (interpreting § 541(a)), and neither the Court nor the respondents and their *amici* identify any specific case in which a court pronounced itself powerless to avoid a collusive foreclosure sale. But cf. *Madrid*, *supra*, at 1204 (Farris, J., concurring). It would seem peculiar, then, that for no sound reason, Congress would have tinkered with these closely watched sections of the Bankruptcy Code, for the sole purpose of endowing bankruptcy courts with authority that had not been found wanting in the first place.[8]

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[7] Evidently, many States take a less Panglossian view than does the majority about the prices paid at sales conducted in accordance with their prescribed procedures. If foreclosure-sale prices truly represented what properties are "worth," *ante*, at 539, or their "fair and proper price," *ante*, at 545, it would stand to reason that deficiency judgments would be awarded simply by calculating the difference between the debt owed and the "value," as established by the sale. Instead, in those jurisdictions permitting creditors to seek deficiency judgments it is quite common to require them to show that the foreclosure price roughly approximated the property's (appraised) value. See, *e. g.*, Tex. Prop. Code Ann. §§ 51.003–51.005 (Supp. 1992); see generally *Gelfert* v. *National City Bank of N. Y.*, 313 U. S. 221 (1941); cf. *id.*, at 233 ("[T]he price which property commands at a forced sale may be hardly even a rough measure of its value").

The Court's second answer to the objection that it renders the statute a dead letter is to remind us that the statute applies to all sorts of transfers, not just to real estate foreclosures, and as to all the others, the provision enjoys great vitality, calling for true comparison between value received for the property and its "reasonably equivalent value." (Indeed, the Court has no trouble acknowledging that something "similar to" fair market value may supply the benchmark of reasonable equivalence when such a sale is not initiated by a mortgagee, *ante*, at 545.) This answer, however, is less tenable than the first. A common rule of construction calls for a single definition of a common term occurring in several places within a statute, see *Bray* v. *Alexandria Women's Health Clinic,* 506 U. S. 263, 283 (1993); *Dewsnup* v. *Timm,* 502 U. S., at 422 (SCALIA, J., dissenting) ("'[N]ormal rule[s] of statutory construction'" require that "identical words *[used] in the same section of the same enactment*" must be given the same effect) (emphasis in original), and the case for different definitions within a single text is difficult to make, cf. *Bray, supra,* at 292 (SOUTER, J., concurring in part). But to give a single term two different and inconsistent meanings (one procedural, one substantive) for a single occurrence is an offense so unlikely that no common prohibition has ever been thought necessary to guard against it.[9] Cf. *Owen* v. *Owen,* 500 U. S. 305, 313 (1991) (declining to "create a distinction [between state and federal exemptions] that the words of the statute do not contain"); *Union Bank* v. *Wolas,* 502 U. S. 151, 162 (1991) (the "statutory text . . . makes no distinction between short-term debt and long-term debt"). Unless whimsy is attributed to Congress, the term in question cannot be exclusively procedural in one class of cases and entirely substantive in all others. To be sure, there are real differences between sales on mortgage foreclosures and other transfers, as Congress no doubt understood, but these differences may be addressed simply and consistently with the statute's plain meaning.[10]

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[8] That is not the only aspect of the majority's approach that is hard to square with the amended text. By redefining "transfer" in § 101, Congress authorized the trustee to avoid any "foreclosure of the equity of redemption" for "less than a reasonably equivalent value." In light of the fact, see, *e. g.*, Lifton, Real Estate in Trouble: Lender's Remedies Need an Overhaul, 31 Bus. Law 1927, 1937 (1976), that most foreclosure properties are sold (at noncollusive and procedurally unassailable sales, we may presume) for the precise amount of the outstanding indebtedness, when some (but by no means all) are worth more, see generally Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850 (1985), it seems particularly curious that Congress would amend a statute to recognize that a debtor "transfers" an "interest in property," when the equity of redemption is foreclosed, fully intending that the "reasonably equivalent value" of that interest would, in the majority of cases, be presumed conclusively to be zero.

To the extent that the Court believes the amended § 548(a)(2)(A) to be addressed to "collusive" sales, meanwhile, a surprisingly indirect means was chosen. Cf. 11 U. S. C. § 363(n) (authorizing trustee avoidance of postpetition sale, or, in the alternative, recovery of the difference between the "value" of the property and the "sale price," when the "sale price was controlled by an agreement"). Cf. *ante*, at 537 (citing *Chicago* v. *Environmental Defense Fund*, *ante*, at 338).

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[9] Indeed, the Court candidly acknowledges that the proliferation of meanings may not stop at two: not only does "reasonably equivalent value" mean one thing for foreclosure sales and another for other transfers, but tax sales and other transactions may require still other, unspecified "benchmark[s]." See *ante,* at 537, and n. 3.

[10] The Court's somewhat mischievous efforts to dress its narrowly procedural gloss in respectable, substantive garb, see *ante,* at 537–538, 546–547, make little sense. The majority suggests that even if the statute must be read to require a comparison, the one it compels dooms the trustee always to come up short. A property's "value," the Court would have us believe, should be determined with reference to a State's rules governing creditors' enforcement of their rights, in the same fashion that it might encom-

The "neologism," *ante*, at 537, "reasonably equivalent value" (read in light of the amendments confirming that foreclosures are to be judged under the same standard as are

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pass a zoning rule governing (as a matter of state law) a neighboring landowner's entitlement to build a gas station. But the analogy proposed ignores the patent difference between these two aspects of the "regulatory background," *ante*, at 539: while the zoning ordinance would reduce the value of the property "to the world," foreclosure rules affect not the price any purchaser "would pay," *ibid.*, but rather the means by which the mortgagee is permitted to extract its entitlement from the entire "value" of the property.

Such distinctions are a mainstay of bankruptcy law, where it is commonly said that creditors' "substantive" state-law rights "survive" in bankruptcy, while their "procedural" or "remedial" rights under state debtor-creditor law give way, see, *e. g.*, *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U. S. 365, 370–371 (1988) (refusing to treat "right to immediate foreclosure" as an "interest in property" under applicable nonbankruptcy law); *Owen* v. *Owen*, 500 U. S. 305 (1991) (bankruptcy exemption does not incorporate state law with respect to liens); *United States* v. *Whiting Pools, Inc.*, 462 U. S. 198, 206–207 (1983); see also *Gelfert* v. *National City Bank of N. Y.*, 313 U. S., at 234 ("[T]he advantages of a forced sale" are not "a . . . property right" under the Constitution). And while state foreclosure rules reflect, *inter alia*, an understandable judgment that creditors should not be forced to wait indefinitely as their defaulting debtors waste the value of loan collateral, bankruptcy law affords mortgagees distinct and presumably adequate protections for their interest, see 11 U. S. C. §§548(c), 550(d)(1), 362(d); *Wright* v. *Union Central Life Ins. Co.*, 311 U. S. 273, 278–279 (1940), along with the general promise that the debtor's estate will, effectively, be maximized in the interest of creditors.

The majority professes to be "baffled," *ante*, at 539, n. 5, by this commonsense distinction between state zoning laws and state foreclosure procedures. But a zoning rule is not merely "price-affecting," *ante*, at 539: it affects the property's value (*i. e.*, the price for which any transferee can expect to resell). State-mandated foreclosure procedures, by contrast, might be called "price-affecting," in the sense that adherence solely to their minimal requirements will no doubt keep sale prices low. But state rules hardly forbid mortgagees to make efforts to encourage more robust bidding at foreclosure sales; they simply fail to furnish sellers any reason to do so, see *infra*.

other transfers) has a single meaning in the one provision in which it figures: a court should discern the "value" of the property transferred and determine whether the price paid was, under the circumstances, "less than reasonabl[e]." There is thus no reason to rebuke the Courts of Appeals for having failed to "come to grips," *ante*, at 538, with the implications of the fact that foreclosure sales cannot be expected to yield fair market value. The statute has done so for them. As courts considering nonforeclosure transfers often acknowledge, the qualification "reasonably equivalent" itself embodies both an awareness that the assets of insolvent debtors are commonly transferred under conditions that will yield less than their optimal value and a judgment that avoidance in bankruptcy (unsettling as it does the expectations of parties who may have dealt with the debtor in good faith) should only occur when it is clear that the bankruptcy estate will be substantially augmented. See, *e. g.*, *In re Southmark Corp.*, 138 B. R. 820, 829–830 (Bkrtcy. Ct. ND Tex. 1992) (court must compare "the value of what went out with the value of what came in," but the equivalence need not be "dollar for dollar") (citation omitted); *In re Countdown of Conn., Inc.*, 115 B. R. 18, 21 (Bkrtcy. Ct. Conn. 1990) ("[S]ome disparity between the value of the collateral and the value of debt does not necessarily lead to a finding of lack of reasonably equivalent value").[11]

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[11] Indeed, it is not clear from its opinion that the Court has "come to grips," *ante*, at 538, with the reality that "involuntary" transfers occur outside the real property setting, that legally voluntary transfers can be involuntary in fact, and that, where insolvent debtors on the threshold of bankruptcy are concerned, transfers for full, "fair market" price are more likely the exception than the rule. On the Court's reading, for example, nothing would prevent a debtor who deeded property to a mortgagee "in lieu of foreclosure" prior to bankruptcy from having the transaction set aside, under the "ordinar[y]," *ante*, at 545, substantive standard.

B

I do not share in my colleagues' apparently extreme discomfort at the prospect of vesting bankruptcy courts with responsibility for determining whether "reasonably equivalent value" was received in cases like this one, nor is the suggestion well taken that doing so is an improper abdication. Those courts regularly make comparably difficult (and contestable) determinations about the "reasonably equivalent value" of assets transferred through other means than foreclosure sales, see, *e. g., Covey* v. *Commercial Nat. Bank,* 960 F. 2d 657, 661–662 (CA7 1992) (rejecting creditor's claim that resale price may be presumed to be "reasonably equivalent value" when that creditor "seiz[es] an asset and sell[s] it for just enough to cover its loan (even if it would have been worth substantially more as part of an ongoing enterprise)"); *In re Morris Communications NC, Inc.,* 914 F. 2d 458 (CA4 1990) (for "reasonably equivalent value" purposes, worth of entry in cellular phone license "lottery" should be discounted to reflect probability of winning); cf. *In re Royal Coach Country, Inc.,* 125 B. R. 668, 673–674 (Bkrtcy. Ct. MD Fla. 1991) (avoiding exchange of 1984 truck valued at $2,800 for 1981 car valued at $500), and there is every reason to believe that they, familiar with these cases (and with local conditions) as we are not, will give the term sensible content in evaluating particular transfers on foreclosure, cf. *United States* v. *Energy Resources Co.,* 495 U. S. 545, 549 (1990); *NLRB* v. *Bildisco & Bildisco,* 465 U. S. 513, 527 (1984); *Rosen* v. *Barclays Bank of N. Y.,* 115 B. R. 433 (EDNY 1990).[12] As in other § 548(a)(2) cases, a trustee seeking

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[12] It is only by renewing, see *ante,* at 548, its extreme claim, but see n. 2, *supra,* that market value is wholly irrelevant to the analysis of foreclosure-sale transfer (and that bankruptcy courts are debarred from even "referring" to it) that the Court is able to support its assertion that evaluations of such transactions are somehow uniquely beyond their ken.

The majority, as part of its last-ditch effort to salvage some vitality for the provision, itself would require bankruptcy judges to speculate as to the avoidance of a foreclosure-sale transfer must persuade the bankruptcy court that the price obtained on prebankruptcy transfer was "unreasonabl[y]" low, and as in other cases under the provision, the gravamen of such a claim will be that the challenged transfer significantly and needlessly diminished the bankruptcy estate, *i. e.*, that it extinguished a substantial equity interest of the debtor and that the foreclosing mortgagee failed to take measures which (consistently with state law, if not required by it) would have augmented the price realized.[13]

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price "that would have been received if the foreclosure sale had proceeded according to [state] law." *Ante*, at 546; cf. *ante*, at 540 (expressing skepticism about judicial competence to determine "such a thing" as a "fair" forced-sale price).

[13] In this regard and in its professions of deference to the processes of local self-government, the Court wrongly elides any distinction between what state law commands and what the States permit. While foreclosure sales "under state law" may typically be sparsely attended and yield low prices, see *infra*, at 564, these are perhaps less the result of state law "strictures," *ante*, at 538, than of what state law fails to supply, incentives for foreclosing lenders to seek higher prices (by availing themselves of advertising or brokerage services, for example). Thus, in judging the reasonableness of an apparently low price, it will surely make sense to take into account (as the Court holds a bankruptcy court is forbidden to) whether a mortgagee who promptly resold the property at a large profit answers, "I did the most that could be expected of me" or "I did the least I was allowed to."

I also do not join my colleagues in their special scorn for the "70% rule" associated with *Durrett* v. *Washington Nat. Ins. Co.*, 621 F. 2d 201 (CA5 1980), which they decry, *ante*, at 540, as less an exercise in statutory interpretation than one of "policy determinatio[n]." Such, of course, it may be, in the limited sense that the statute's text no more mentions the 70% figure than it singles out procedurally regular foreclosure sales for the special treatment the Court accords them. But the *Durrett* "rule," as its expositor has long made clear, claims only to be a description of what foreclosure prices have, in practice, been found "reasonabl[e]," and as such, it is consistent (as the majority's "policy determination" is not), with the textual directive that one value be compared to another, the transfer being set aside when one is unreasonably "less than" the other. To the extent, moreover, that *Durrett* is said to have announced a "rule," it is better

Whether that enquiry is described as a search for a benchmark "'fair' forced-sale price," *ante*, at 540, or for the price that was reasonable under the circumstances, cf. *ante*, at 538, n. 4, is ultimately, as the Court itself seems to acknowledge, see *ante*, at 540, of no greater moment than whether the rule the Court discerns in the provision is styled an "exception," an "irrebuttable presumption," or a rule of *per se* validity. The majority seems to invoke these largely synonymous terms in service of its thesis that the provision's text is "ambiguous" (and therefore ripe for application of policy-based construction rules), but the question presented here, whether the term "less than reasonably equivalent value" may be read to forestall all enquiry beyond whether state-law foreclosure procedures were adhered to, admits only two answers, and only one of these, in the negative, is within the "apparent authority," *ibid.*, conferred on courts by the text of the Bankruptcy Code.[14]

C

What plain meaning requires and courts can provide, indeed, the policies underlying a national bankruptcy law fully

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understood as recognizing a "safe harbor" or affirmative defense for bidding mortgagees or other transferees who paid 70% or more of a property's appraised value at the time of sale.

[14] The Court's criticism, *ante*, at 546–548, deftly conflates two distinct questions: is the price on procedurally correct and noncollusive sale presumed irrebuttably to be reasonably equivalent value (the question before us) and, if not, what are the criteria (a question not raised here but explored by courts that have rejected the irrebuttable presumption)? What is "plain" is the answer to the first question, thanks to the plain language, whose meaning is confirmed by policy and statutory history. The answer to the second may not be plain in the sense that the criteria might be self-evident, see n. 13, *supra*, but want of self-evidence hardly justifies retreat from the obvious answer to the first question. Courts routinely derive criteria, unexpressed in a statute, to implement standards that are statutorily expressed, and in a proper case this Court could (but for the majority's decision) weigh the relative merits of the subtly different approaches taken by courts that have rejected the irrebuttable presumption.

support. This case is a far cry from the rare one where the effect of implementing the ordinary meaning of the statutory text would be "patent absurdity," see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 452 (1987) (SCALIA, J., concurring in judgment), or "demonstrably at odds with the intentions of its drafters," *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 244 (1989) (internal quotation marks omitted).[15] Permitting avoidance of procedurally regular foreclosure sales for low prices (and thereby returning a valuable asset to the bankruptcy estate) is plainly consistent with those policies of obtaining a maximum and equitable distribution for creditors and ensuring a "fresh start" for individual debtors, which the Court has often said are at the core of federal bankruptcy law. See *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918); *Williams* v. *United States Fidelity & Guaranty Co.*, 236 U. S. 549, 554–555 (1915). They are not, of course, any less the policies of federal bankruptcy law simply because state courts will not, for a mortgagor's benefit, set aside a foreclosure sale for "price inadequacy" alone.[16] The unwillingness of the state courts to upset a foreclosure sale for that reason does not address the question of what "reasonably equivalent value" means in bankruptcy law, any more than the refusal of those same courts to set aside a contract for "mere inadequacy of consideration," see Restatement (Second) of Contracts § 79 (1981), would define the scope of the trustee's power to reject executory contracts. See 11 U. S. C. § 365 (1988 ed. and Supp. IV). On the contrary, a central premise of the bankruptcy avoidance powers is that what state law plainly allows as acceptable or "fair," as between a debtor and a particular creditor, may be set aside because of its impact on other creditors or on the debtor's chances for a fresh start.

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[15] Tellingly, while the Court's opinion celebrates fraudulent conveyance law and state foreclosure law as the "twin pillars" of creditor-debtor regulation, it evinces no special appreciation of the fact that this case arises under the Bankruptcy Code, which, in maintaining the national system of credit and commerce, embodies policies distinct from those of state debtor-creditor law, see generally *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918), and which accordingly endows trustees with avoidance power beyond what state law provides, see *Board of Trade of Chicago* v. *Johnson*, 264 U. S. 1, 10 (1924); *Stellwagen*, *supra*, at 617; 11 U. S. C. §§ 541(a), 544(a).

[16] Although the majority accurately states this "'black letter'" law, it also acknowledges that courts will avoid a foreclosure sale for a price that "shock[s] the conscience," see *ante*, at 542 (internal quotation marks omitted), a standard that has been invoked to justify setting aside sales yielding as much as 87% of appraised value. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 862–870 (1980). Moreover, while price inadequacy "alone" may not be enough to set aside a sale, such inadequacy will often induce a court to undertake a sort of "strict scrutiny" of a sale's compliance with state procedures. See, *e. g., id.*, at 861.

When the prospect of such avoidance is absent, indeed, the economic interests of a foreclosing mortgagee often stand in stark opposition to those of the debtor himself and of his other creditors. At a typical foreclosure sale, a mortgagee has no incentive to bid any more than the amount of the indebtedness, since any "surplus" would be turned over to the debtor (or junior lienholder), and, in some States, it can even be advantageous for the creditor to bid less and seek a deficiency judgment. See generally Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843, 847–851 (1980); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933, 959–962 (1985); G. Osborne, G. Nelson, & D. Whitman, Real Estate Finance Law § 8.3, p. 528 (1979). And where a property is obviously worth more than the amount of the indebtedness, the lending mortgagee's interests are served best if the foreclosure sale is poorly attended; then, the lender is more likely to take the property by bidding the amount of indebtedness, retaining for itself any profits from resale. While state foreclosure procedures may somewhat mitigate the potential for this sort of opportunism (by requiring for publication of notice, for example), it surely is plausible that Congress, in drafting the Bankruptcy Code, would find it intolerable that a debtor's assets be wasted and the bankruptcy estate diminished, solely to speed a mortgagee's recovery.

II

Confronted with the eminent sense of the natural reading, the Court seeks finally to place this case in a line of decisions, *e. g., Gregory* v. *Ashcroft,* 501 U. S. 452 (1991), in which we have held that something more than mere plain language is required.[17] Because the stability of title in real property may be said to be an "important" state interest, the Court suggests, see *ante,* at 544, the statute must be presumed to contain an implicit foreclosure-sale exception, which Congress must override expressly or not at all. Our cases impose no such burden on Congress, however. To be sure, they do offer support for the proposition that when the Bankruptcy Code is truly silent or ambiguous, it should not be read as departing from previous practice, see, *e. g., Dewsnup* v. *Timm,* 502 U. S. 410 (1992); *Butner* v. *United States,* 440 U. S. 48, 54 (1979). But we have never required Congress to supply "clearer textual guidance" when the apparent meaning of the Bankruptcy Code's text is itself clear, as it is here. See *Ron Pair,* 489 U. S., at 240 ("[I]t is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute"); cf. *Dewsnup, supra,* at 434 (SCALIA, J., dissenting) (Court should not "venerat[e] 'pre-Code law'" at the expense of plain statutory meaning).[18]

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[17] The Court dangles the possibility that *Gregory* itself is somehow pertinent to this case, but that cannot be so. There, invoking principles of constitutional avoidance, we recognized a "plain statement" rule, whereby Congress could supplant state powers "reserved under the Tenth Amendment" and "at the heart of representative government," only by making its intent to do so unmistakably clear. Unlike the States' authority to "determine the qualifications of their most important government officials," 501 U. S., at 463 (*e. g.,* to enforce a retirement age for state judges mandated by the State Constitution, at issue in *Gregory*), the authority of the States in defining and adjusting the relations between debtors and creditors has never been plenary, nor could it fairly be called "essential to their independence." In making the improbable contrary assertion, the Court converts a stray phrase in *American Land Co.* v. *Zeiss,* 219 U. S. 47 (1911), which upheld against substantive due process challenge the power of a State to legislate with respect to land titles (California's effort to restore order after title records had been destroyed in the calamitous 1906 San Francisco earthquake) into a pronouncement about the allocation of responsibility between the National Government and the States. Cf. *Cipollone* v. *Liggett Group, Inc.,* 505 U. S. 504, 546 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (emphasizing the inapplicability of "clear-statement" rules to ordinary pre-emption cases).

We have, on many prior occasions, refused to depart from plain Code meaning in spite of arguments that doing that would vindicate similar, and presumably equally "important," state interests. In *Owen* v. *Owen,* 500 U. S. 305 (1991), for example, the Court refused to hold that the state "opt-out" policy embodied in § 522(b)(1) required immunity from avoidance under § 522(f) for a lien binding under Florida's exemption rules. We emphasized that "[n]othing in the text of § 522(f) remotely justifies treating the [state and federal] exemptions differently." 500 U. S., at 313. And in *Johnson* v. *Home State Bank,* 501 U. S. 78 (1991), we relied on plain Code language to allow a debtor who had "stripped" himself of personal mortgage liability under Chapter 7 to reschedule the remaining indebtedness under Chapter 13, notwithstanding a plausible contrary argument based on Code structure and a complete dearth of precedent for the manoeuver under state law and prior bankruptcy practice.

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[18] Even if plain language is insufficiently "clear guidance" for the Court, further guidance is at hand here. The provision at hand was amended in the face of judicial decisions driven by the same policy concerns that animate the Court, to make plain that foreclosure sales and other "involuntary" transfers are within the sweep of the avoidance power.

The Court has indeed given full effect to Bankruptcy Code terms even in cases where the Code would appear to have cut closer to the heart of state power than it does here. No "clearer textual guidance" than a general definitional provision was required, for example, to hold that criminal restitution could be a "debt" dischargeable under Chapter 13, see *Davenport*, 495 U. S., at 563–564 (declining to "carve out a broad judicial exception" from statutory term, even to avoid "hamper[ing] the flexibility of state criminal judges"). Nor, in *Perez* v. *Campbell*, 402 U. S. 637 (1971), did we require an express reference to state highway safety laws before construing the generally worded discharge provision of the Bankruptcy Act to bar application of a state statute suspending the driver's licenses of uninsured tortfeasors.[19]

Rather than allow state practice to trump the plain meaning of federal statutes, cf. *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638, 648 (1990), our cases describe a contrary rule: whether or not Congress has used any special "pre-emptive" language, state regulation must yield to the extent it actually conflicts with federal law. This is no less true of laws enacted under Congress's power to "establish . . . uniform Laws on the subject of Bankruptcies," U. S. Const., Art. I, § 8, cl. 4, than of those passed under its Commerce Clause power. See generally *Perez* v. *Campbell*, *supra;* cf. *id.*, at

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[19] Only over vigorous dissent did the Court read the trustee's generally worded abandonment power, 11 U. S. C. § 554, as not authorizing abandonment "in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards." *Midlantic Nat. Bank* v. *New Jersey Dept. of Environmental Protection*, 474 U. S. 494, 505 (1986); cf. *id.*, at 513 (REHNQUIST, J., dissenting) ("Congress knew how to draft an exception covering the exercise of 'certain' police powers when it wanted to"); cf. also L. Cherkis & L. King, Collier Real Estate Transactions and the Bankruptcy Code, p. 6–24 (1992) (post-*Midlantic* cases suggest that "if the hazardous substances on the property do not pose immediate danger to the public, and if the trustee has promptly notified local environmental authorities of the contamination and cooperated with them, abandonment may be permitted").

651–652 (rejecting the "aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration"); *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 545, 546 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part) (arguing against a "presumption against . . . pre-emption" of "historic police powers") (internal quotation marks omitted).

Nor, finally, is it appropriate for the Court to look to "field pre-emption" cases, see *ante*, at 544, to support the higher duty of clarity it seeks to impose on Congress. As written and as applied by the majority of Courts of Appeals to construe it, the disputed Code provision comes nowhere near working the fundamental displacement of the state law of foreclosure procedure that the majority's rhetoric conjures.[20]

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[20] Talk of "'radica[l] adjust[ments to] the balance of state and national authority,'" *ante*, at 544, notwithstanding, the Court's submission with respect to "displacement" consists solely of the fact that some private companies in *Durrett* jurisdictions have required purchasers of title insurance to accept policies with "specially crafted exceptions from coverage in many policies issued for properties purchased at foreclosure sales." *Ante*, at 544 (citing Cherkis & King, *supra*, at 5–18 to 5–19). The source cited by the Court reports that these exceptions have been demanded when mortgagees are the purchasers, but have not been required in policies issued to third-party purchasers or their transferees, Cherkis & King, *supra*, at 5–18 to 5–19, and that such clauses have neither been limited to *Durrett* jurisdictions, nor confined to avoidance under federal bankruptcy law. See Cherkis & King, *supra*, at 5–10 (noting one standard exclusion from coverage for "[a]ny claim, which arises . . . by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws"). Nothing in the Bankruptcy Code, moreover, deprives the States of their broad powers to regulate directly the terms and conditions of title insurance policies.

The "federally created cloud" on title seems hardly to be the Damoclean specter that the Court makes it out to be. In the nearly 14 years since the *Durrett* decision, the bankruptcy reports have included a relative handful of decisions actually setting aside foreclosure sales, nor do the States, either inside or outside *Durrett* jurisdictions, seem to have ven-

To the contrary, construing § 548(a)(2)(A) as authorizing avoidance of an insolvent's recent foreclosure-sale transfer in which "less than a reasonably equivalent value" was obtained is no more pre-emptive of state foreclosure procedures than the trustee's power to set aside transfers by marital dissolution decree, see *Britt* v. *Damson*, 334 F. 2d 896 (CA9 1964), cert. denied, 379 U. S. 966 (1965); *In re Lange*, 35 B. R. 579 (Bkrtcy. Ct. ED Mo. 1983), "pre-empts" state domestic relations law,[21] or the power to reject executory contracts, see 11 U. S. C. § 365, "displaces" the state law of voluntary obligation. While it is surely true that if the provision were accorded its plain meaning, some States (and many mortgagees) would take steps to diminish the risk that particular transactions would be set aside, such voluntary action should not be cause for dismay: it would advance core Bankruptcy Code purposes of augmenting the bankruptcy estate and improving the debtor's prospects for a "fresh start," without compromising lenders' state-law rights to move expeditiously against the property for the money owed. To the extent, in any event, that the respondents and their numerous *amici* are correct that the "important" policy favoring security of title should count more and the "important" bankruptcy policies should count less, Congress, and not this Court, is the appropriate body to provide a foreclosure-sale exception. See *Wolas*, 502 U. S., at 162. See also S. 1358, 100th Cong., 1st Sess. (1987) (proposed amendment creating foreclosure-sale exception).

III

Like the Court, I understand this case to involve a choice between two possible statutory provisions: one authorizing

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tured major changes in the "diverse networks of . . . rules governing the foreclosure process." See *ante*, at 541.

[21] But cf. *Wetmore* v. *Markoe*, 196 U. S. 68 (1904) (alimony is not a "debt" subject to discharge under the Bankruptcy Act).

the trustee to avoid "involuntar[y] . . . transfers [including foreclosure sales] . . . [for] less than a reasonably equivalent value," see 11 U. S. C. § 548(a), and another precluding such avoidance when "[a] secured party or third party purchaser . . . obtains title to an interest of the debtor in property pursuant to a good faith prepetition foreclosure . . . proceeding . . . permitting . . . the realization of security upon default of the borrower," see S. 445, 98th Cong., 1st Sess., § 360 (1983). But that choice is not ours to make, for Congress made it in 1984, by enacting the former alternative into law and not the latter. Without some indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it. Doing that in this case would produce no frustration or absurdity, but quite the opposite.

NATIONAL LABOR RELATIONS BOARD *v.* HEALTH CARE & RETIREMENT CORPORATION OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 92–1964. Argued February 22, 1994—Decided May 23, 1994

Employees are considered "supervisors," and thus are not covered under the National Labor Relations Act, 29 U. S. C. § 152(3), if they have authority, requiring the use of independent judgment, to engage in one of 12 listed activities and they hold the authority "in the interest of the employer," § 152(11). Petitioner National Labor Relations Board has stated that a nurse's supervisory activity incidental to the treatment of patients is not authority exercised in the interest of the employer. Respondent owns and operates a nursing home at which staff nurses—including the four nurses involved in this case—are the senior ranking employees on duty most of the time, ensure adequate staffing, make daily work assignments, monitor and evaluate the work of nurses' aides, and report to management. In finding that respondent had committed an unfair labor practice in disciplining the four nurses, an Administrative Law Judge concluded that the nurses were not supervisors because their focus was on the well-being of the residents, not the employer. The Board affirmed, but the Court of Appeals reversed, deciding that the Board's test for determining nurses' supervisory status was inconsistent with the statute.

Held: The Board's test for determining whether nurses are supervisors is inconsistent with the statute. Pp. 576–584.

(a) The Board has created a false dichotomy—between acts taken in connection with patient care and acts taken in the interest of the employer. Cf. *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 688. Since patient care is a nursing home's business, it follows that attending to the needs of patients, who are the employer's customers, is in the employer's interest. This conclusion is supported by the Court's decision in *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485, 488–489, interpreting the phrase "in the interest of an employer." Pp. 576–580.

(b) The Board's nonstatutory arguments supporting its interpretation are unpersuasive. Its contention that granting organizational rights to nurses whose supervisory authority concerns patient care does not threaten the conflicting loyalties that the supervisor exception was designed to avoid is rejected. The Act must be enforced according to its own terms, not by creating legal categories inconsistent with its meaning. Nor can the tension between the Act's exclusion of supervisory and managerial employees and its inclusion of professionals be resolved by distorting the statutory language in the manner proposed by the Board. In addition, an isolated statement in the legislative history of the 1974 amendments to the Act—expressing apparent approval of the application of the Board's then-current supervisory test to nurses—does not represent an authoritative interpretation of the phrase "in the interest of the employer" enacted by Congress in 1947. Pp. 580–582.

987 F. 2d 1256, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BLACKMUN, STEVENS, and SOUTER, JJ., joined, *post*, p. 584.

Michael R. Dreeben argued the cause for petitioner. With him on the briefs were *Solicitor General Days, Deputy Solicitor General Wallace, Jerry M. Hunter, Nicholas E. Karatinos, Norton J. Come, Linda Sher, John Emad Arbab,* and *Daniel Silverman.*

Maureen E. Mahoney argued the cause for respondent. With her on the brief were *Cary R. Cooper, Margaret J. Lockhart,* and *R. Jeffrey Bixler.**

JUSTICE KENNEDY delivered the opinion of the Court.

The National Labor Relations Act (Act) affords employees the rights to organize and to engage in collective bargaining free from employer interference. The Act does not grant those rights to supervisory employees, however, so the statutory definition of supervisor becomes essential in determining which employees are covered by the Act. In this case, we decide the narrow question whether the National Labor Relations Board's (Board's) test for determining if a nurse is a supervisor is consistent with the statutory definition.

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Marsha S. Berzon* and *Laurence Gold;* and for the American Nurses Association by *Barbara J. Sapin* and *Woody N. Peterson.*

Briefs of *amici curiae* urging affirmance were filed for the American Health Care Association by *Andrew A. Peterson, Thomas V. Walsh,* and *Patrick L. Vaccaro;* for the Council on Labor Law Equality by *Gerard C. Smetana* and *Michael E. Avakian;* and for U. S. Home Care Corp. by *William H. DuRoss III.*

I

Congress enacted the National Labor Relations Act in 1935. Act of July 5, 1935, ch. 372, 49 Stat. 449. In the early years of its operation, the Act did not exempt supervisory employees from its coverage; as a result, supervisory employees could organize as part of bargaining units and negotiate with the employer. Employers complained that this produced an imbalance between labor and management, but in 1947 this Court refused to carve out a supervisory employee exception from the Act's broad coverage. The Court stated that "it is for Congress, not for us, to create exceptions or qualifications at odds with [the Act's] plain terms." *Packard Motor Car Co.* v. *NLRB,* 330 U. S. 485, 490 (1947). Later that year, Congress did just that, amending the statute so that the term "'employee' . . . shall not include . . . any individual employed as a supervisor." 61 Stat. 137–138, codified at 29 U. S. C. § 152(3). Congress defined a supervisor as:

> "[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 61 Stat. 138, codified at 29 U. S. C. § 152(11).

As the Board has stated, the statute requires the resolution of three questions; and each must be answered in the affirmative if an employee is to be deemed a supervisor. First, does the employee have authority to engage in 1 of the 12 listed activities? Second, does the exercise of that authority require "the use of independent judgment"? Third, does the employee hold the authority "in the interest of the employer"? *Northcrest Nursing Home,* 313 N. L. R. B. 491, 493 (1993). This case concerns only the third question, and our decision turns upon the proper interpretation of the statutory phrase "in the interest of the employer."

In cases involving nurses, the Board admits that it has interpreted the statutory phrase in a unique manner. Tr. of Oral Arg. 52 (Board: "[t]he Board has not applied a theory that's phrased in the same terms to other categories of professionals"). The Board has held that "a nurse's direction of less-skilled employees, in the exercise of professional judgment incidental to the treatment of patients, is not authority exercised 'in the interest of the employer.'" Pet. for Cert. 15. As stated in reviewing its position on this issue in its recent decision in *Northcrest Nursing Home, supra,* at 491–492, the Board believes that its special interpretation of "in the interest of the employer" in cases involving nurses is necessary because professional employees (including registered nurses) are not excluded from coverage under the Act. See 29 U. S. C. § 152(12). Respondent counters that "[t]here is simply no basis in the language of the statute to conclude that direction given to aides in the interest of nursing home residents, pursuant to professional norms, is not 'in the interest of the employer.'" Brief for Respondent 30.

In this case, the Board's General Counsel issued a complaint alleging that respondent, the owner and operator of the Heartland Nursing Home in Urbana, Ohio, had committed unfair labor practices in disciplining four licensed practical nurses. At Heartland, the Director of Nursing has overall responsibility for the nursing department. There is also an Assistant Director of Nursing, 9 to 11 staff nurses (including both registered nurses and the four licensed practical nurses involved in this case), and 50 to 55 nurses' aides. The staff nurses are the senior ranking employees on duty after 5 p.m. during the week and at all times on weekends—approximately 75% of the time. The staff nurses have responsibility to ensure adequate staffing; to make daily work assignments; to monitor the aides' work to ensure proper performance; to counsel and discipline aides; to resolve aides' problems and grievances; to evaluate aides' performances; and to report to management. In light of these varied activities, respondent contended, among other things, that the four nurses involved in this case were supervisors, and so not protected under the Act. The Administrative Law Judge (ALJ) disagreed, concluding that the nurses were not supervisors. The ALJ stated that the nurses' supervisory work did not "equate to responsibly . . . direct[ing] the aides *in the interest of the employer,*" noting that "the nurses' focus is on the well-being of the residents rather than of the employer." 306 N. L. R. B. 68, 70 (1992) (internal quotation marks omitted) (emphasis added). The Board stated only that "[t]he judge found, and we agree, that the Respondent's staff nurses are employees within the meaning of the Act." 306 N. L. R. B. 63, 63, n. 1 (1992).

The United States Court of Appeals for the Sixth Circuit reversed. 987 F. 2d 1256 (1993). The Court of Appeals had decided in earlier cases that the Board's test for determining the supervisory status of nurses was inconsistent with the statute. See *Beverly California Corp.* v. *NLRB,* 970 F. 2d 1548 (1992); *NLRB* v. *Beacon Light Christian Nursing Home,* 825 F. 2d 1076 (1987). In *Beverly,* for example, the court had stated that "the notion that direction given to subordinate personnel to ensure that the employer's nursing home customers receive 'quality care' somehow fails to qualify as direction given 'in the interest of the employer' makes very little sense to us." 970 F. 2d, at 1552. Addressing the instant case, the court followed *Beverly* and again held the

Board's interpretation inconsistent with the statute. 987 F. 2d, at 1260. The court further stated that "it is up to Congress to carve out an exception for the health care field, including nurses, should Congress not wish for such nurses to be considered supervisors." *Id.*, at 1261. The court "remind[ed] the Board that it is the courts, and not the Board, who bear the final responsibility for interpreting the law." *Id.*, at 1260. After concluding that the Board's test was inconsistent with the statute, the court found that the four licensed practical nurses involved in this case were supervisors. *Id.*, at 1260–1261.

We granted certiorari, 510 U. S. 810 (1993), to resolve the conflict in the Courts of Appeals over the validity of the Board's rule. See, *e. g., Waverly-Cedar Falls Health Care Center, Inc.* v. *NLRB*, 933 F. 2d 626 (CA8 1991); *NLRB* v. *Res-Care, Inc.*, 705 F. 2d 1461 (CA7 1983); *Misericordia Hospital Medical Center* v. *NLRB*, 623 F. 2d 808 (CA2 1980).

II

We must decide whether the Board's test for determining if nurses are supervisors is rational and consistent with the Act. See *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 42 (1987). We agree with the Court of Appeals that it is not.

A

The Board's interpretation, that a nurse's supervisory activity is not exercised in the interest of the employer if it is incidental to the treatment of patients, is similar to an approach the Board took, and we rejected, in *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672 (1980). There, we had to determine whether faculty members at Yeshiva were "managerial employees." Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 288 (1974) (internal quotation marks omitted). Like supervisory employees, managerial employees are excluded from the Act's coverage. *Id.*, at 283 ("so clearly outside the Act that no specific exclusionary provision was thought necessary"). The Board in *Yeshiva* argued that the faculty members were not managerial, contending that faculty authority was "exercised in the faculty's own interest rather than in the interest of the university." 444 U. S., at 685. To support its position, the Board placed much reliance on the faculty members' independent professional role in designing the curriculum and in discharging their professional obligations to the students. We found the Board's reasoning unpersuasive:

> "In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.
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> ". . . The 'business' of a university is education." *Id.*, at 688.

The Board's reasoning fares no better here than it did in *Yeshiva*. As in *Yeshiva*, the Board has created a false dichotomy—in this case, a dichotomy between acts taken in connection with patient care and acts taken in the interest of the employer. That dichotomy makes no sense. Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer. See *Beverly California, supra*, at 1553. We thus see no basis for the Board's blanket assertion that supervisory authority exercised in connection with patient care is somehow not in the interest of the employer.

Our conclusion is supported by the case that gave impetus to the statutory provision now before us. In *Packard Motor*, we considered the phrase "in the interest of an employer" contained in the definition of "employer" in the original 1935 Act. We stated that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest." 330 U. S., at 488. We rejected the argument of the dissenters who, like the Board in this case, advanced the proposition that the phrase covered only "those who acted for management . . . in formulating [and] executing its labor policies." *Id.*, at 496 (Douglas, J., dissenting); cf. Reply Brief for Petitioner 4 (filed July 23, 1993) (nurses are supervisors when, "in addition to performing their professional duties and responsibilities, they also possess the authority to affect the job status or pay of employees working under them"). Consistent with the ordinary meaning of the phrase, the Court in *Packard Motor* determined that acts within the scope of employment or on the authorized business of the employer are "in the interest of the employer." 330 U. S., at 488–489. There is no indication that Congress intended any different meaning when it included the phrase in the statutory definition of supervisor later in 1947. To be sure, Congress altered the result of *Packard Motor*, but it did not change the meaning of the phrase "in the interest of the employer" when doing so. And we of course have rejected the argument that a statute altering the result reached by a judicial decision necessarily changes the meaning of the language interpreted in that decision. See *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 168 (1989).

Not only is the Board's test inconsistent with *Yeshiva*, *Packard Motor*, and the ordinary meaning of the phrase "in the interest of the employer," it also renders portions of the statutory definition in § 2(11) meaningless. Under § 2(11), an employee who in the course of employment uses independent judgment to engage in 1 of the 12 listed activities, including responsible direction of other employees, is a supervisor. Under the Board's test, however, a nurse who in the course of employment uses independent judgment to engage in responsible direction of other employees is not a supervisor. Only a nurse who in the course of employment uses independent judgment to engage in one of the activities related to another employee's job status or pay can qualify as a supervisor under the Board's test. See Reply Brief for Petitioner 4 (filed July 23, 1993) (nurses are supervisors when they affect "job status or pay of employees working under them"). The Board provides no plausible justification, however, for reading the responsible direction portion of § 2(11) out of the statute in nurse cases, and we can perceive none.

The Board defends its test by arguing that phrases in § 2(11) such as "independent judgment" and "responsibly to direct" are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees. That is no doubt true, but it is irrelevant in this particular case because interpretation of those phrases is not the underpinning of the Board's test. The Board instead has placed exclusive reliance on the "in the interest of the employer" language in § 2(11). With respect to that particular phrase, we find no ambiguity supporting the Board's position. It should go without saying, moreover, that ambiguity in one portion of a statute does not give the Board license to distort other provisions of the statute. Yet that is what the Board seeks us to sanction in this case.

The interpretation of the "in the interest of the employer" language mandated by our precedents and by the ordinary meaning of the phrase does not render the phrase meaningless in the statutory definition. The language ensures, for example, that union stewards who adjust grievances are not considered supervisory employees and deprived of the Act's protections. But the language cannot support the Board's argument that supervision of the care of patients is not in the interest of the employer. The welfare of the patient, after all, is no less the object and concern of the employer than it is of the nurses. And the statutory dichotomy the Board has created is no more justified in the health care field than it would be in any other business where supervisory duties are a necessary incident to the production of goods or the provision of services.

B

Because the Board's test is inconsistent with both the statutory language and this Court's precedents, the Board seeks to shift ground, putting forth a series of nonstatutory arguments. None of them persuades us that we can ignore the statutory language and our case law.

The Board first contends that we should defer to its test because, according to the Board, granting organizational rights to nurses whose supervisory authority concerns patient care does not threaten the conflicting loyalties that the supervisor exception was designed to avoid. Brief for Petitioner 25. We rejected the same argument in *Yeshiva* where the Board contended that there was "no danger of divided loyalty and no need for the managerial exclusion" for the Yeshiva faculty members. 444 U. S., at 684. And we must reject that reasoning again here. The Act is to be enforced according to its own terms, not by creating legal categories inconsistent with its meaning, as the Board has done in nurse cases. Whether the Board proceeds through adjudication or rulemaking, the statute must control the Board's decision, not the other way around. See *Florida Power & Light Co.* v. *Electrical Workers*, 417 U. S. 790, 811 (1974); cf. *Packard Motor*, *supra*, at 493 (rejecting resort to policy and legislative history in interpreting meaning of the phrase "in the interest of the employer"). Even on the assumption, moreover, that the statute permits consideration of the potential for divided loyalties so that a unique interpretation is permitted in the health care field, we do not share the

Board's confidence that there is no danger of divided loyalty here. Nursing home owners may want to implement policies to ensure that patients receive the best possible care despite potential adverse reaction from employees working under the nurses' direction. If so, the statute gives nursing home owners the ability to insist on the undivided loyalty of its nurses notwithstanding the Board's impression that there is no danger of divided loyalty.

The Board also argues that "[t]he statutory criterion of having authority 'in the interest of the employer' . . . must not be read so broadly that it overrides Congress's intention to accord the protections of the Act to professional employees." Brief for Petitioner 26; see 29 U. S. C. § 152(12). The Act does not distinguish professional employees from other employees for purposes of the definition of supervisor in § 2(11). The supervisor exclusion applies to "any individual" meeting the statutory requirements, not to "any nonprofessional employee." In addition, the Board relied on the same argument in *Yeshiva,* but to no avail. The Board argued that "the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those employees often appear to be exercising managerial authority when they are merely performing routine job duties." 444 U. S., at 683–684. Holding to the contrary, we said that the Board could not support a statutory distinction between the university's interest and the managerial interest being exercised on its behalf. There is no reason for a different result here. To be sure, as recognized in *Yeshiva,* there may be "some tension between the Act's exclusion of [supervisory and] managerial employees and its inclusion of professionals," but we find no authority for "suggesting that that tension can be resolved" by distorting the statutory language in the manner proposed by the Board. *Id.,* at 686.

Finally, as a reason for us to defer to its conclusion, the Board cites legislative history of the 1974 amendments to other sections of the Act. Those amendments did not alter the test for supervisory status in the health care field, yet the Board points to a statement in a Committee Report expressing apparent approval of the Board's then-current application of its supervisory employee test to nurses. S. Rep. No. 93–766, p. 6 (1974); see *Yeshiva, supra,* at 690, n. 30. As an initial matter, it is far from clear that the Board in fact had a consistent test for nurses before 1974. Compare *Avon Convalescent Center, Inc.,* 200 N. L. R. B. 702 (1972), with *Doctors' Hospital of Modesto, Inc.,* 183 N. L. R. B. 950 (1970). In any event, the isolated statement in the 1974 Committee Report does not represent an authoritative interpretation of the phrase "in the interest of the employer," which was enacted by Congress in 1947. "[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." *Pierce* v. *Underwood,* 487 U. S. 552, 566 (1988). Indeed, in *American Hospital Assn.* v. *NLRB,* 499 U. S. 606 (1991), the petitioner pointed to isolated statements from the same 1974 Senate Report cited here and argued that they revealed Congress' intent with respect to a provision of the original 1935 Act. We dismissed the argument, stating that such statements do not have "the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating." *Id.,* at 616; see also *Betts,* 492 U. S., at 168. In this case as well, we must reject the Board's reliance on the 1974 Committee Report. If Congress wishes to enact the policies of the Board, it can do so without indirection. See generally *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A., ante,* at 185–188.

III

An examination of the professional's duties (or in this case the duties of the four nonprofessional nurses) to determine whether 1 or more of the 12 listed activities is performed in a manner that makes the employee a supervisor is, of course, part of the Board's routine and proper adjudicative function.

In cases involving nurses, that inquiry no doubt could lead the Board in some cases to conclude that supervisory status has not been demonstrated. The Board has not sought to sustain its decision on that basis here, however. It has chosen instead to rely on an industrywide interpretation of the phrase "in the interest of the employer" that contravenes precedents of this Court and has no relation to the ordinary meaning of that language.

To be sure, in applying § 2(11) in other industries, the Board on occasion reaches results reflecting a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives. It is important to emphasize, however, that in almost all of those cases (unlike in cases involving nurses) the Board's decisions did not result from manipulation of the statutory phrase "in the interest of the employer," but instead from a finding that the employee in question had not met the other requirements for supervisory status under the Act, such as the requirement that the employee exercise one of the listed activities in a nonroutine manner. See *supra*, at 573 (listing other requirements for supervisory status). That may explain why the Board did not cite in its submissions to this Court a single case outside the health care field approving the interpretation of "in the interest of the employer" the Board uses in nurse cases. That the Board sometimes finds a professional employee not to be a supervisor when applying other elements of the statutory definition of § 2(11) cannot be shoehorned into the conclusion that the Board can rely on its strained interpretation of the phrase "in the interest of the employer" in all nurse cases. If we accepted the Board's position in this case, moreover, nothing would prevent the Board from applying this interpretation of "in the interest of the employer" to all professional employees.

We note further that our decision casts no doubt on Board or court decisions interpreting parts of § 2(11) other than the specific phrase "in the interest of the employer." Because the Board's interpretation of "in the interest of the employer" is for the most part confined to nurse cases, our decision will have almost no effect outside that context. Any parade of horribles about the meaning of this decision for employees in other industries is thus quite misplaced; indeed, the Board does not make that argument.

In sum, the Board's test for determining the supervisory status of nurses is inconsistent with the statute and our precedents. The Board did not petition this Court to uphold its order in this case under any other theory. See Brief for Respondent 21, n. 25. If the case presented the question whether these nurses were supervisors under the proper test, we would have given a lengthy exposition and analysis of the facts in the record. But as we have indicated, the Board made and defended its decision by relying on the particular test it has applied to nurses. Our conclusion that the Court of Appeals was correct to find the Board's test inconsistent with the statute therefore suffices to resolve the case. The judgment of the Court of Appeals is

Affirmed.

JUSTICE GINSBURG, with whom JUSTICE BLACKMUN, JUSTICE STEVENS, and JUSTICE SOUTER join, dissenting.

The National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, guarantees organizational, representational, and bargaining rights to "employees," but expressly excludes "supervisors" from that protected class. See §§ 157, 152(3). Section 2(11) of the Act defines the term "supervisor" by, first, enumerating 12 supervisory actions (including, for example, hiring, firing, disciplining, assigning, and "responsibly" directing) and, further, prescribing that "any individual" who has "authority, in the interest of the employer," to perform or "effectively to recommend" any of these actions is a supervisor, provided that the exercise of such authority requires "independent judgment" rather than "merely routine or clerical" action. § 152(11).

In contrast to its exclusion of supervisors, the Act expressly includes "professional employees" within its protections.[1] Section 2(12) defines "professional employee" as one whose work is "predominantly intellectual and varied in character," involves "the consistent exercise of discretion and judgment in its performance," produces a result that "cannot be standardized in relation to a given period of time," and requires knowledge "in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital." 29 U. S. C. § 152(12)(a).[2]

The categories "supervisor" and "professional" necessarily overlap. Individuals within the overlap zone—those who are both "supervisor" and "professional"—are excluded from the Act's coverage. For that reason, the scope accorded the Act's term "supervisor" determines the extent to which professionals are covered. If the term "supervisor" is construed broadly, to reach everyone with any authority to use "independent judgment" to assign and "responsibly . . . direct" the work of other employees, then most professionals would be supervisors, for most have *some* authority to assign and direct others' work. If the term "supervisor" is understood that broadly, however, Congress' inclusion of professionals within the Act's protections would effectively be nullified.

The separation of "supervisors," excluded from the Act's compass, from "professionals," sheltered by the Act, is a task Congress committed to the National Labor Relations Board (NLRB or Board) in the first instance. The Board's attempt to carry out that charge is the matter under examination in this case.

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[1] See § 152(12) (defining "professional employee"); § 159(b) (limiting National Labor Relations Board's discretion to place professional and nonprofessional employees in the same bargaining unit).

[2] The definition of "professional employee" further includes persons who have completed the required course of study and are "performing related work under the supervision of a professional person" in order finally to qualify as a professional. § 152(12)(b).

The controversy before the Court involves the employment status of certain licensed practical nurses at Heartland Nursing Home in Urbana, Ohio. Unlike registered nurses, who are professional employees, licensed practical nurses are considered "technical" employees. The Board, however, applies the same test of supervisory status to licensed practical nurses as it does to registered nurses where, as in this case, the practical nurses have the same duties as registered nurses. See 306 N. L. R. B. 68, 69, n. 5 (1992) (duties of staff nurses at Heartland, the evidence showed, "were virtually the same whether the nurses were [licensed practical nurses] or [registered nurses]"); *Ohio Masonic Home, Inc.*, 295 N. L. R. B. 390, 394–395, and n. 1 (1989); cf. *NLRB* v. *Res-Care, Inc.*, 705 F. 2d 1461, 1466 (CA7 1983) (licensed practical nurses "are, if not full-fledged professionals, at least sub-professionals").

Through case-by-case adjudication, the Board has sought to distinguish individuals exercising the level of control that truly places them in the ranks of management, from highly skilled employees, whether professional or technical, who perform, incidentally to their skilled work, a limited supervisory role. I am persuaded that the Board's approach is rational and consistent with the Act. I would therefore uphold the administrative determination, affirmed by the Board, that Heartland's practical nurses are protected employees.

I

As originally enacted in 1935, the National Labor Relations Act (Act), 29 U. S. C. § 151 *et seq.*, did not expressly exclude supervisors from the class of "employees" entitled to the Act's protections. See §§ 7, 2(3), 49 Stat. 452, 450. The Board decided in *Packard Motor Co.*, 61 N. L. R. B. 4 (1945), that in the absence of an express exclusion, supervisors must be held within the Act's coverage. This Court agreed, stating that the language of the Act allowed no other interpretation. *Packard Motor Car Co.* v. *NLRB,* 330 U. S. 485 (1947).

Congress responded by excluding supervisors in the Labor-Management Relations Act, 1947.[3] The Senate Committee Report noted that the Senate's definition of "supervisor"[4] had been framed with a view to assuring that "the employees . . . excluded from the coverage of the act [would] be truly supervisory." S. Rep. No. 105, 80th Cong., 1st Sess., 19 (1947) (hereinafter Senate Report), Legislative History 425; see also H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947), Legislative History 539 ("supervisor" limited "to individuals generally regarded as foremen and persons of like or higher rank"). As the Senate Report explains:

> "[T]he committee has not been unmindful of the fact that certain employees with minor supervisory duties have problems which may justify their inclusion [within the protections of the Act]. It has therefore distinguished between straw bosses, leadmen, set-up men, and other minor supervisory employees, on the one hand, and the supervisor vested with such genuine management prerogatives as the right to hire or fire, discipline, or make

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[3] Section 2(11) of the Act defines a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 29 U. S. C. § 152(11). Section 2(3) provides, in part, that "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor." § 152(3).

[4] The House and Senate bills defined the term "supervisor" differently; the Conference Committee adopted the Senate version. See H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 35 (1947), reprinted in 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, p. 539 (1948) (hereinafter Legislative History).

> effective recommendations with respect to such action." Senate Report, at 4, Legislative History 410.

The purpose of § 2(11)'s definition of "supervisor," then, was to limit the term's scope to "the front line of management," the "foremen" who owed management "undivided loyalty," *id.*, at 5, Legislative History 411, as distinguished from workers with "minor supervisory duties."

At the very time that Congress excluded supervisors from the Act's protection, it added a definition of "professional employees." See 29 U. S. C. § 152(12).[5] The inclusion of that definition, together with an amendment to § 9(b) of the Act limiting the placement of professionals and nonprofessionals in the same bargaining unit, see n. 1, *supra*, confirm that Congress did not intend its exclusion of supervisors largely to eliminate coverage of professional employees.

Nevertheless, because most professionals supervise to some extent, the Act's inclusion of professionals is in tension with its exclusion of supervisors. The Act defines a supervisor as "any individual" with authority to use "independent judgment" "to . . . assign . . . other employees, or responsibly to direct them." Professionals, by definition, exercise independent judgment, see 29 U. S. C. § 152(12), and most professionals have authority to assign tasks to other employees and "responsibly to direct" their work. See *NLRB* v. *Res-Care, Inc.*, 705 F. 2d 1461, 1465 (CA7 1983) (Posner, J.) ("[M]ost professionals have some supervisory responsibilities in the sense of directing another's work—the lawyer his secretary, the teacher his teacher's aide, the doctor his nurses, the registered nurse her nurse's aide, and so on."). If possession of such authority and the exercise of independent judgment were sufficient to classify an individual as a statutory "supervisor," then few professionals would receive the Act's protections, contrary to Congress' express intention categorically to include "professional employees."

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[5] "The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

II

A

The NLRB has recognized and endeavored to cope with the tension between the Act's exclusion of supervisors and its inclusion of professional employees. See, *e. g., Northcrest Nursing Home*, 313 N. L. R. B. 491 (1993). To harmonize the two prescriptions, the Board has properly focused on the policies that motivated Congress to exclude supervisors. Accounting for the exclusion of supervisors, the Act's drafters emphasized that employers must have the "undivided loyalty" of those persons, "traditionally regarded as part of management," on whom they have bestowed "such genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with respect to such action." See Senate Report, at 3–4, Legislative History 409–410 (quoted in *Northcrest Nursing Home*, 313 N. L. R. B., at 491. Accordingly, the NLRB classifies as supervisors individuals who use independent judgment in the exercise of managerial or disciplinary authority over other employees. *Id.*, at 493–494. But because professional employees often are not in management's "front line," the "undivided loyalty" concern is somewhat less urgent for this class of workers. The Board has therefore determined that the exercise of professional judgment "to assign and direct other employees in the interest of providing high quality and efficient service" does not, by itself, "confer supervisory status." *Id.*, at 494.

The NLRB has essayed this exposition of its inquiry:

> "In determining the existence of supervisory status, the Board must first determine whether the individual possesses any of the 12 indicia of supervisory authority and, if so, whether the exercise of that authority entails 'independent judgment' or is 'merely routine.' If the individual independently exercises supervisory authority, the Board must then determine if that authority is exercised 'in the interest of the employer.'" *Id.*, at 493.

As applied to the health-care field, the Board has reasoned that to fit the formulation "in the interest of the employer," the nurse's superintendence of others must reflect key managerial authority, and not simply control attributable to the nurse's "professional or technical status," direction incidental to "sound patient care." *Id.*, at 493, 496. Cf. *Children's Habilitation Center, Inc.* v. *NLRB*, 887 F. 2d 130, 134 (CA7 1989) (Posner, J.) (authority does not fit within the "interest of the employer" category if it is "exercised in accordance with professional rather than business norms," *i. e.*, in accordance with "professional standards rather than . . . the company's profit-maximizing objectives").

B

The NLRB's "patient care analysis" is not a rudderless rule for nurses, but an application of the approach the Board has pursued in other contexts. The Board has employed the distinction between authority arising from professional knowledge, on one hand, and authority encompassing front-line management prerogatives, on the other, to resolve cases concerning the supervisory status of, for example, doctors,[6] faculty members,[7] pharmacists,[8] librarians,[9] social workers,[10] lawyers,[11] television station directors,[12] and, as this Court has noted, architects and engineers. See *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672, 690, n. 30 (1980) (citing cases). Indicating approval of the NLRB's general approach to the Act's coverage of professionals, the Court stated in *Yeshiva:*

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[6] See *The Door,* 297 N. L. R. B. 601, 602, n. 7 (1990) ("routine direction of employees based on a higher level of skill or experience is not evidence of supervisory status").

[7] See *Detroit College of Business,* 296 N. L. R. B. 318, 320 (1989) (professional employees "'[f]requently require the ancillary services of nonprofessional employees in order to carry out their professional, not supervisory, responsibilities,'" but "it was not Congress' intention to exclude them from the Act 'by the rote application of the statute without any reference to its purpose or the individual's place on the labor-management spectrum'"), quoting *New York Univ.,* 221 N. L. R. B. 1148, 1156 (1975).

[8] See *Sav-On Drugs, Inc.,* 243 N. L. R. B. 859, 862 (1979) ("pharmacy managers do exercise discretion and judgment" in assigning and directing clerks, but "such exercise . . . falls clearly within the ambit of their professional responsibilities, and does not constitute the exercise of supervisory authority in the interest of the Employer").

[9] See *Marymount College of Virginia,* 280 N. L. R. B. 486, 489 (1986) (rejecting classification of catalog librarian as a statutory supervisor, although librarian's authority over technician's work included "encouraging productivity, reviewing work for typographical errors, and providing answers to the technician's questions based on the catalog librarian's professional knowledge").

[10] See *Youth Guidance Center,* 263 N. L. R. B. 1330, 1335, and n. 23 (1982) ("senior supervising social workers" and "supervising social workers" not statutory supervisors; "[t]he Board has carefully and consistently avoided applying the statutory definition of 'supervisor' to professionals who give direction to other employees in the exercise of professional judgment which is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer").

[11] See *Neighborhood Legal Services, Inc.,* 236 N. L. R. B. 1269, 1273 (1978): "[T]o the extent that the [attorneys in question] train, assign, or direct work of legal assistants and paralegals for whom they are professionally responsible, we do not find the exercise of such authority to confer supervisory status within the meaning of Section 2(11) of the Act, but rather to be an incident of their professional responsibilities as attorneys and thereby as officers of the court." The Board continued: "[W]e are careful to avoid applying the definition of 'supervisor' to professionals who direct other employees in the exercise of their professional judgment,

> "The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress . . . ." *Id.*, at 690 (footnote omitted).

Notably, in determining whether, in a concrete case, nurses are supervisors within the meaning of the Act, the Board has drawn particularly upon its decisions in "leadperson" controversies. "Leadpersons" include skilled employees who do not qualify as statutory "professionals," but, like professional employees, have some authority to assign or direct other workers. In leadperson cases, as in cases involving professionals, the NLRB has distinguished between authority that derives from superior skill or experience, and authority that "flows from management and tends to identify or associate a worker with management." *South-*

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which direction is incidental to the practice of their profession, and thus is not the exercise of supervisory authority in the interest of the Employer." *Id.*, at 1273, n. 9.

[12] See *Golden-West Broadcasters-KTLA*, 215 N. L. R. B. 760, 762, n. 4 (1974): "[A]n employee with special expertise or training who directs or instructs another in the proper performance of his work for which the former is professionally responsible is not thereby rendered a supervisor. . . . This is so even when the more senior or more expert employee exercises some independent discretion where, as here, such discretion is based upon special competence or upon specific articulated employer policies."

ern Bleacher & Print Works, Inc., 115 N. L. R. B. 787, 791 (1956), enforced, 257 F. 2d 235, 239 (CA4 1958); cf. *Northcrest Nursing Home*, 313 N. L. R. B., at 494–495 (drawing the analogy between leadpersons and charge nurses in hospitals and nursing homes). Differentiating the role of front-line managers from that of leadperson, the Board has placed some nurses, because of the level of their authority, in the supervisor category, while ranking others, as in this case, in a professional (or technical), but not supervisor, class. See cases cited in *id.*, at 498, n. 36.

III

Following the pattern revealed in NLRB decisions, the Administrative Law Judge (ALJ), affirmed by the Board, determined that the four licensed practical nurses in this case were not supervisors. The ALJ closely examined the organization and operation of nursing care at Heartland and found the nurses' direction of aides "closely akin to the kind of directing done by leadmen or straw bosses, persons . . . Congress plainly considered to be 'employees.'" 306 N. L. R. B., at 70. Backing up this finding, the ALJ pointed out that, although the nurses "g[a]ve orders (of certain kinds) to the aides, and the aides follow[ed] those orders," *id.*, at 72, the nurses "spen[t] only a small fraction of their time exercising that authority," *id.*, at 69. Essentially, the nurses labored "to ensure that the needs of the residents [were] met," and to that end, they "check[ed] for changes in the health of the residents, administer[ed] medicine, . . . receive[d] status reports from the nurses they relieve[d], and g[a]ve [such] reports to aides coming on duty and to the nurses' reliefs," pinch-hit for aides in "bathing, feeding or dressing residents," and "handle[d] incoming telephone calls from physicians and from relatives of residents who want[ed] information about a resident's condition." *Ibid.*

The ALJ noted, too, that "when setting up the aide-resident assignments," the nurses "followed old patterns"; indeed, "the nurses routinely let the aides decide among themselves which aide was to cover which residents." *Id.*, at 70. The administrator and the director of nursing were "always on call" and nurses in fact called them at their homes "when non-routine matters ar[o]se." *Id.*, at 72.

Throughout the hearing, the ALJ reported, he gained "the impression that Heartland's administrator believed that the nurses' views about anything other than hands-on care of the residents were not worth considering." *Ibid.* "[T]he actions of Heartland's administrator," the ALJ concluded, repeatedly and unmistakably demonstrated that "to [Heartland's] management, Heartland's nurses were just hired hands." *Ibid.* I see no tenable basis for rejecting the ALJ's ultimate ruling that the nurses' jobs did not entail genuine, front-line supervisory status of the kind that would exclude them from the Act's protection.

IV

A

The phrase ultimately limiting the § 2(11) classification "supervisor" is, as the Court recognizes, "in the interest of the employer." To give that phrase meaning as a discrete and potent limitation, the Board has construed it, in diverse contexts, to convey more than the obligation all employees have to further the employer's business interests, indeed more than the authority to assign and direct other employees pursuant to relevant professional standards. See, *e. g., Northcrest Nursing Home*, 313 N. L. R. B. 491 (1993) (nurses); *Youth Guidance Center*, 263 N. L. R. B. 1330, 1335, and n. 23 (1982) (social workers); *Sav-On Drugs, Inc.*, 243 N. L. R. B. 859, 862 (1979) (pharmacists); *Neighborhood Legal Services, Inc.*, 236 N. L. R. B. 1269, 1273, and n. 9 (1978) (attorneys).[13] It is a defining task of management to formulate and execute labor policies for the shop; correspondingly, the persons charged with superintending management policy regarding labor are the "supervisors" who, in the Board's view, act "in the interest of the employer."

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[13] The Board, as the decisions cited in text demonstrate, takes no unique approach in cases involving nurses. See also cases cited, *supra*, at 591–592, nn. 6–7, 9, 12. Nor, contrary to the Court's report, see *ante*, at 574, did counsel for the NLRB admit to deviant interpretation of the phrase,

Maintaining professional standards of course serves the interest of an enterprise, and the NLRB is hardly blind to that obvious point. See *Northcrest Nursing Home*, 313 N. L. R. B., at 494 (interest of employer and employees not likely to diverge on charge nurse decisions concerning methods of attending to patients' needs). But "the interest of the employer" may well tug against that of employees, on matters such as "hiring, firing, discharging, and fixing pay"; "in the interest of the employer," persons with authority regarding "things of that sort" are properly ranked "supervisor."[14]

"interest of the employer," in nurses' cases. When asked whether "[i]t is uniquely nurses" who do not act "in the interest of the employer" when attending to "the needs of the customer," counsel replied, "No, it is not uniquely nurses." Tr. of Oral Arg. 52. While counsel continued, when pressed, to say that "[t]he Board has not applied a theory that's phrased in the same terms to other categories of professionals," *ibid.*, counsel appears to have been referring to the precisely particularized, "patient care" version of the inquiry. Counsel added: "What the Board has done is draw an analogy between . . . what nurses do and what other minor supervisory employees do. . . . [T]he Board's rule in this case is fully consistent with the traditional rule that it has applied." *Id.*, at 53.

[14] See 92 Cong. Rec. 5930 (1946), containing the statement of Representative Case on a forerunner of present § 2(11), included as part of the Case bill, passed by Congress, but vetoed by President Truman in 1946. Representative Case stated of the bill's provision, nearly identical to the present § 2(11): "'In the interest of the employer'—that is the key phrase to keep in mind. . . . All that the section on supervisory employees does is to say that if 'in the interest of the employer,' [a] person has a primary responsibility in hiring, firing, discharging, and fixing pay, and things of that sort, then at the bargaining table he shall not sit on the side of the employee, but shall sit on the side of the employer. . . . No man can serve two masters. If you are negotiating a contract, a lawyer does not represent both clients. That is all that is involved here."

The Court does not deny that the phrase "in the interest of the employer" was intended to limit, not to expand, the category "supervisor."[15] Yet the reading the Court gives to the phrase allows it to provide only one example of workers who would not fit the description: "The language ensures . . . that union stewards who adjust grievances are not considered supervisory employees and deprived of the Act's protections." *Ante,* at 579. Section 2(11)'s expression, "in the interest of the employer," however, modifies all 12 of the listed supervisory activities, not just the adjustment of grievances. Tellingly, the single example the Court gives, "union stewards who adjust grievances," rests on the very distinction the Board has endeavored to apply in all quarters of the workplace: one between "management" interests peculiar to the employer, and the sometimes conflicting interests of employees.[16]

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[15] The Court does maintain, however, that Congress meant to embrace our statement in *Packard Motor Car Co.* v. *NLRB,* 330 U. S. 485 (1947), that "[e]very employee, from the very fact of employment in the master's business, is required to act in his interest." *Id.,* at 488; see *ante,* at 578. But Congress' purpose, in enacting § 2(11), was to overturn the Court's holding in *Packard Motor Car.* Thus it is more likely that Congress was taken by Justice Douglas' dissenting view that "acting in the interest of the employer" fits employees who act for management "not only in formulating but also in executing its labor policies." 330 U. S., at 496. Moreover, Congress had included the phrase, "in the interest of the employer," the year before *Packard Motor Car,* in a predecessor bill to the Labor-Management Relations Act that defined the term "supervisor" almost identically. See n. 14, *supra.* Finally, the Court acknowledged in *Packard Motor Car* that the phrase "interest of the employer" may also be read more narrowly, in contradistinction to employees' interests in improving their compensation and working conditions. 330 U. S., at 489, 490. *Packard Motor Car,* then, does not support the conclusion that the words, "interest of the employer," have a plain meaning inconsistent with the interpretation the Board has given them in supervisor cases.

[16] The Court suggests that the Board has "rea[d] the responsible direction portion of § 2(11) out of the statute in nurse cases." *Ante,* at 579 (referring to the words "responsibly to direct" in § 2(11)'s list of supervisory activities). The author of the amendment that inserted those words

Congress adopted the supervisor exclusion to bind to management those persons "vested with . . . genuine management prerogatives," Senate Report, at 4, Legislative History 410, *i. e.*, those with the authority and duty to act specifically "in the interest of the employer" on matters as to which management and labor interests may divide. The Board has been faithful to the task Congress gave it, I believe, in distinguishing the employer's hallmark managerial interest—its interest regarding labor-management relations—from the general interest of the enterprise, shared by its professional and technical employees, in providing high-quality service.

B

In rejecting the Board's approach, the Court relies heavily on *NLRB* v. *Yeshiva Univ.*, 444 U. S. 672 (1980). The heavy weight placed on *Yeshiva* is puzzling, for the Court in that case noted with approval the Board's decisions differentiating professional team leaders (or "project captains") from "supervisors." Such leaders are "employees," not "supervisors," the Board held, and the Court agreed, "despite [their] substantial planning responsibility and authority to direct and evaluate team members." *Id.*, at 690, n. 30. "In the health-care context," specifically, the Court in *Yeshiva* observed, "the Board asks in each case whether the decisions alleged to be managerial or supervisory are 'incidental to' or 'in addition to' the treatment of patients." That approach, the Court said in *Yeshiva*, "accurately capture[d] the intent of Congress." *Id.*, at 690.

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explained, however, that persons having authority "responsibly to direct" other employees are persons with "essential managerial duties" who rank "above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees,' as enumerated in the [Senate] report." 93 Cong. Rec. 4678 (1947), Legislative History 1303 (remarks of Sen. Flanders). As explained above, the Board has used this same analogy to straw bosses and leadpersons to determine whether particular nurses are supervisors. See *supra*, at 592–593.

The Court today also expresses doubt whether "the statute permits consideration of the potential for divided loyalties." *Ante*, at 580 (implying that consideration of this potential would entail a "unique interpretation [of the statute] . . . in the health care field"). But again, *Yeshiva* points the other way. The Court's opinion in *Yeshiva* acknowledged that the Act's exclusion of supervisors "grow[s] out of the . . . concern . . . [t]hat an employer is entitled to the undivided loyalty of its representatives." 444 U. S., at 682. The Court decided that the Yeshiva University faculty members were not entitled to the Act's protection, precisely because their role as "representative" of the employer presented a grave danger of divided loyalties. The Yeshiva faculty, the Court stated, was pivotal in defining and implementing the employer's managerial interests; its "authority in academic matters [wa]s absolute," and it "determine[d] . . . the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Id.*, at 686. No plausible equation can be made between the self-governing Yeshiva faculty, on one hand, and on the other, the licensed practical nurses involved in this case, with their limited authority to assign and direct the work of nurses' aides, pursuant to professional standards.

V

The Court's opinion has implications far beyond the nurses involved in this case. If any person who may use independent judgment to assign tasks to others or direct their work is a supervisor, then few professionals employed by organizations subject to the Act will receive its protections.[17] The

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[17] As the Board repeatedly warned in its presentations to this Court: "If all it took to be a statutory supervisor were a showing that an employee gives discretionary direction to an aide, even though done pursuant to the customary norms of the profession, the coverage of professionals would be a virtual nullity." Brief for Petitioner 27; see also *id.*, at 12, Reply Brief for Petitioner 7–8 (filed Jan. 5, 1994).

Board's endeavor to reconcile the inclusion of professionals with the exclusion of supervisors, in my view, is not just "rational and consistent with the Act," *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U. S. 775, 796 (1990); it is *required* by the Act. I would therefore reverse the contrary judgment of the Court of Appeals.

STAPLES *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 92–1441. Argued November 30, 1993—Decided May 23, 1994

The National Firearms Act criminalizes possession of an unregistered "firearm," 26 U. S. C. § 5861(d), including a "machinegun," § 5845(a)(6), which is defined as a weapon that automatically fires more than one shot with a single pull of the trigger, § 5845(b). Petitioner Staples was charged with possessing an unregistered machinegun in violation of § 5861(d) after officers searching his home seized a semiautomatic rifle—*i. e.*, a weapon that normally fires only one shot with each trigger pull—that had apparently been modified for fully automatic fire. At trial, Staples testified that the rifle had never fired automatically while he possessed it and that he had been ignorant of any automatic firing capability. He was convicted after the District Court rejected his proposed jury instruction under which, to establish a § 5861(d) violation, the Government would have been required to prove beyond a reasonable doubt that Staples knew that the gun would fire fully automatically. The Court of Appeals affirmed, concluding that the Government need not prove a defendant's knowledge of a weapon's physical properties to obtain a conviction under § 5861(d).

Held: To obtain a § 5861(d) conviction, the Government should have been required to prove beyond a reasonable doubt that Staples knew that his rifle had the characteristics that brought it within the statutory definition of a machinegun. Pp. 604–619.

(a) The common-law rule requiring *mens rea* as an element of a crime informs interpretation of § 5861(d) in this case. Because some indication of congressional intent, express or implied, is required to dispense with *mens rea*, § 5861(d)'s silence on the element of knowledge required for a conviction does not suggest that Congress intended to dispense with a conventional *mens rea* requirement, which would require that the defendant know the facts making his conduct illegal. Pp. 604–606.

(b) The Court rejects the Government's argument that the Act fits within the Court's line of precedent concerning "public welfare" or "regulatory" offenses and thus that the presumption favoring *mens rea* does not apply in this case. In cases concerning public welfare offenses, the Court has inferred from silence a congressional intent to dispense with conventional *mens rea* requirements in statutes that regulate potentially harmful or injurious items. In such cases, the Court has reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation, and is placed on notice that he must determine at his peril whether his conduct comes within the statute's inhibition. See, *e. g., United States* v. *Balint*, 258 U. S. 250; *United States* v. *Freed*, 401 U. S. 601. Guns, however, do not fall within the category of dangerous devices as it has been developed in public welfare offense cases. In contrast to the selling of dangerous drugs at issue in *Balint* or the possession of hand grenades considered in *Freed*, private ownership of guns in this country has enjoyed a long tradition of being entirely lawful conduct. Thus, the destructive potential of guns in general cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as dispensing with proof of knowledge of the characteristics that make a weapon a "firearm" under the statute. The Government's interpretation potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent. Had Congress intended to make outlaws of such citizens, it would have spoken more clearly to that effect. Pp. 606–616.

(c) The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms the foregoing reading of the Act. Where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. Pp. 616–619.

(d) The holding here is a narrow one that depends on a commonsense evaluation of the nature of the particular device Congress has subjected to regulation, the expectations that individuals may legitimately have in dealing with that device, and the penalty attached to a violation. It does not set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. Pp. 619–620.

971 F. 2d 608, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and SOUTER, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post*, p. 620. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 624.

Jennifer L. De Angelis argued the cause for petitioner. With her on the brief was *Clark O. Brewster*.

James A. Feldman argued the cause for the United States. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Keeney, Deputy Solicitor General Bryson*, and *John F. De Pue.*

JUSTICE THOMAS delivered the opinion of the Court.

The National Firearms Act makes it unlawful for any person to possess a machinegun that is not properly registered with the Federal Government. Petitioner contends that, to convict him under the Act, the Government should have been required to prove beyond a reasonable doubt that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun. We agree and accordingly reverse the judgment of the Court of Appeals.

I

The National Firearms Act (Act), 26 U. S. C. §§ 5801–5872, imposes strict registration requirements on statutorily defined "firearms." The Act includes within the term "firearm" a machinegun, § 5845(a)(6), and further defines a machinegun as "any weapon which shoots, . . . or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," § 5845(b). Thus, any fully automatic weapon is a "firearm" within the meaning of the Act.[1] Under the Act, all firearms must be registered in the National Firearms Registration and Transfer Record maintained by the Secretary of the Treasury. § 5841. Section 5861(d) makes it a crime, punishable by up to 10 years in prison, see § 5871, for any person to possess a firearm that is not properly registered.

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[1] As used here, the terms "automatic" and "fully automatic" refer to a weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted. Such weapons are "machineguns" within the meaning of the Act. We use the term "semiautomatic" to designate a weapon that fires only one shot with each pull of the trigger, and which requires no manual manipulation by the operator to place another round in the chamber after each round is fired.

Upon executing a search warrant at petitioner's home, local police and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) recovered, among other things, an AR–15 rifle. The AR–15 is the civilian version of the military's M–16 rifle, and is, unless modified, a semiautomatic weapon. The M–16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire. Many M–16 parts are interchangeable with those in the AR–15 and can be used to convert the AR–15 into an automatic weapon. No doubt to inhibit such conversions, the AR–15 is manufactured with a metal stop on its receiver that will prevent an M–16 selector switch, if installed, from rotating to the fully automatic position. The metal stop on petitioner's rifle, however, had been filed away, and the rifle had been assembled with an M–16 selector switch and several other M–16 internal parts, including a hammer, disconnector, and trigger. Suspecting that the AR–15 had been modified to be capable of fully automatic fire, BATF agents seized the weapon. Petitioner subsequently was indicted for unlawful possession of an unregistered machinegun in violation of § 5861(d).

At trial, BATF agents testified that when the AR–15 was tested, it fired more than one shot with a single pull of the trigger. It was undisputed that the weapon was not registered as required by § 5861(d). Petitioner testified that the rifle had never fired automatically when it was in his possession. He insisted that the AR–15 had operated only semiautomatically, and even then imperfectly, often requiring manual ejection of the spent casing and chambering of the next round. According to petitioner, his alleged ignorance of any automatic firing capability should have shielded him from criminal liability for his failure to register the weapon. He requested the District Court to instruct the jury that, to establish a violation of § 5861(d), the Government must prove beyond a reasonable doubt that the defendant "knew that the gun would fire fully automatically." 1 App. to Brief for Appellant in No. 91–5033 (CA10), p. 42.

The District Court rejected petitioner's proposed instruction and instead charged the jury as follows:

> "The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it][2] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation." Tr. 465.

Petitioner was convicted and sentenced to five years' probation and a $5,000 fine.

The Court of Appeals affirmed. Relying on its decision in *United States* v. *Mittleider,* 835 F. 2d 769 (CA10 1987), cert. denied, 485 U. S. 980 (1988), the court concluded that the Government need not prove a defendant's knowledge of a weapon's physical properties to obtain a conviction under § 5861(d). 971 F. 2d 608, 612–613 (CA10 1992). We granted certiorari, 508 U. S. 939 (1993), to resolve a conflict in the Courts of Appeals concerning the *mens rea* required under § 5861(d).

II

A

Whether or not § 5861(d) requires proof that a defendant knew of the characteristics of his weapon that made it a "firearm" under the Act is a question of statutory construction. As we observed in *Liparota* v. *United States,* 471 U. S. 419 (1985), "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Id.,* at 424 (citing *United States* v. *Hudson,* 7 Cranch 32

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[2] In what the parties regard as a mistranscription, the transcript contains the word "suggested" instead of "which subjects it."

(1812)). Thus, we have long recognized that determining the mental state required for commission of a federal crime requires "construction of the statute and . . . inference of the intent of Congress." *United States* v. *Balint*, 258 U. S. 250, 253 (1922). See also *Liparota, supra,* at 423.

The language of the statute, the starting place in our inquiry, see *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992), provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. It states simply that "[i]t shall be unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U. S. C. § 5861(d). Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. See *Balint, supra,* at 251 (stating that traditionally, "*scienter*" was a necessary element in every crime). See also n. 3, *infra.* On the contrary, we must construe the statute in light of the background rules of the common law, see *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436–437 (1978), in which the requirement of some *mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.*, at 436 (internal quotation marks omitted). See also *Morissette* v. *United States*, 342 U. S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").

There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common-law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it." *Balint, supra,* at 251–252. Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, *Liparota, supra,* at 426, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime. Cf. *United States Gypsum, supra,* at 438; *Morissette, supra,* at 263.

According to the Government, however, the nature and purpose of the Act suggest that the presumption favoring *mens rea* does not apply to this case. The Government argues that Congress intended the Act to regulate and restrict the circulation of dangerous weapons. Consequently, in the Government's view, this case fits in a line of precedent concerning what we have termed "public welfare" or "regulatory" offenses, in which we have understood Congress to impose a form of strict criminal liability through statutes that do not require the defendant to know the facts that make his conduct illegal. In construing such statutes, we have inferred from silence that Congress did not intend to require proof of *mens rea* to establish an offense.

For example, in *Balint,* we concluded that the Narcotic Act of 1914, which was intended in part to minimize the spread of addictive drugs by criminalizing undocumented sales of certain narcotics, required proof only that the defendant knew that he was selling drugs, not that he knew the specific items he had sold were "narcotics" within the ambit of the statute. See *Balint, supra,* at 254. Cf. *United States* v. *Dotterweich,* 320 U. S. 277, 281 (1943) (stating in dicta that a statute criminalizing the shipment of adulterated or misbranded drugs did not require knowledge that the items were misbranded or adulterated). As we explained in *Dotterweich, Balint* dealt with "a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing." 320 U. S., at 280–281. See also *Morissette, supra*, at 252–256.

Such public welfare offenses have been created by Congress, and recognized by this Court, in "limited circumstances." *United States Gypsum, supra*, at 437. Typically, our cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items. Cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 564–565 (1971) (characterizing *Balint* and similar cases as involving statutes regulating "dangerous or deleterious devices or products or obnoxious waste materials"). In such situations, we have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him "in responsible relation to a public danger," *Dotterweich, supra*, at 281, he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to "ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Balint, supra*, at 254. Thus, we essentially have relied on the nature of the statute and the particular character of the items regulated to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements. See generally *Morissette, supra*, at 252–260.[3]

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[3] By interpreting such public welfare offenses to require at least that the defendant know that he is dealing with some dangerous or deleterious substance, we have avoided construing criminal statutes to impose a rigorous form of strict liability. See, *e. g.*, *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 563–564 (1971) (suggesting that if a person shipping acid mistakenly thought that he was shipping distilled water, he would not violate a statute criminalizing undocumented shipping of acids). True strict liability might suggest that the defendant need not know even that he was dealing with a dangerous item. Nevertheless, we have referred to public welfare offenses as "dispensing with" or "eliminating" a *mens rea* requirement or "mental element," see, *e. g.*, *Morissette*,

B

The Government argues that §5861(d) defines precisely the sort of regulatory offense described in *Balint.* In this view, all guns, whether or not they are statutory "firearms," are dangerous devices that put gun owners on notice that they must determine at their hazard whether their weapons come within the scope of the Act. On this understanding, the District Court's instruction in this case was correct, because a conviction can rest simply on proof that a defendant knew he possessed a "firearm" in the ordinary sense of the term.

The Government seeks support for its position from our decision in *United States* v. *Freed,* 401 U. S. 601 (1971), which involved a prosecution for possession of unregistered grenades under §5861(d).[4] The defendant knew that the items in his possession were grenades, and we concluded that §5861(d) did not require the Government to prove the defendant also knew that the grenades were unregistered. *Id.,* at 609. To be sure, in deciding that *mens rea* was not required with respect to that element of the offense, we sug-

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342 U. S., at 250, 263; *United States* v. *Dotterweich,* 320 U. S. 277, 281 (1943), and have described them as strict liability crimes, *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 437 (1978). While use of the term "strict liability" is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea;* that is, the requirement of a "guilty mind" with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense. Generally speaking, such knowledge is necessary to establish *mens rea,* as is reflected in the maxim *ignorantia facti excusat.* See generally J. Hawley & M. McGregor, Criminal Law 26–30 (1899); R. Perkins, Criminal Law 785–786 (2d ed. 1969); G. Williams, Criminal Law: The General Part 113–174 (1953). Cf. *Queen* v. *Tolson,* 23 Q. B. 168, 187 (1889) (Stephen, J.) ("[I]t may, I think, be maintained that in every case knowledge of fact [when not appearing in the statute] is to some extent an element of criminality as much as competent age and sanity").

[4] A grenade is a "firearm" under the Act. 26 U. S. C. §§5845(a)(8), 5845(f)(1)(B).

gested that the Act "is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Ibid.* Grenades, we explained, "are highly dangerous offensive weapons, no less dangerous than the narcotics involved in *United States* v. *Balint.*" *Ibid.* But that reasoning provides little support for dispensing with *mens rea* in this case.

As the Government concedes, *Freed* did not address the issue presented here. In *Freed,* we decided only that § 5861(d) does not require proof of knowledge that a firearm is *unregistered.* The question presented by a defendant who possesses a weapon that is a "firearm" for purposes of the Act, but who knows only that he has a "firearm" in the general sense of the term, was not raised or considered. And our determination that a defendant need not know that his weapon is unregistered suggests no conclusion concerning whether § 5861(d) requires the defendant to know of the features that make his weapon a statutory "firearm"; different elements of the same offense can require different mental states. See *Liparota,* 471 U. S., at 423, n. 5; *United States* v. *Bailey,* 444 U. S. 394, 405–406 (1980). See also W. LaFave & A. Scott, Handbook on Criminal Law 194–195 (1972). Moreover, our analysis in *Freed* likening the Act to the public welfare statute in *Balint* rested entirely on the assumption that the defendant *knew* that he was dealing with hand grenades—that is, that he knew he possessed a particularly dangerous type of weapon (one within the statutory definition of a "firearm"), possession of which was not entirely "innocent" in and of itself. 401 U. S., at 609. The predicate for that analysis is eliminated when, as in this case, the very question to be decided is *whether* the defendant must know of the particular characteristics that make his weapon a statutory firearm.

Notwithstanding these distinctions, the Government urges that *Freed*'s logic applies because guns, no less than grenades, are highly dangerous devices that should alert their owners to the probability of regulation. But the gap between *Freed* and this case is too wide to bridge. In glossing over the distinction between grenades and guns, the Government ignores the particular care we have taken to avoid construing a statute to dispense with *mens rea* where doing so would "criminalize a broad range of apparently innocent conduct." *Liparota,* 471 U. S., at 426. In *Liparota,* we considered a statute that made unlawful the unauthorized acquisition or possession of food stamps. We determined that the statute required proof that the defendant knew his possession of food stamps was unauthorized, largely because dispensing with such a *mens rea* requirement would have resulted in reading the statute to outlaw a number of apparently innocent acts. *Ibid.* Our conclusion that the statute should not be treated as defining a public welfare offense rested on the commonsense distinction that a "food stamp can hardly be compared to a hand grenade." *Id.,* at 433.

Neither, in our view, can all guns be compared to hand grenades. Although the contrast is certainly not as stark as that presented in *Liparota,* the fact remains that there is a long tradition of widespread lawful gun ownership by private individuals in this country. Such a tradition did not apply to the possession of hand grenades in *Freed* or to the selling of dangerous drugs that we considered in *Balint.* See also *International Minerals,* 402 U. S., at 563–565; *Balint,* 258 U. S., at 254. In fact, in *Freed* we construed § 5861(d) under the assumption that "one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Freed, supra,* at 609. Here, the Government essentially suggests that we should interpret the section under the altogether different assumption that "one would hardly be surprised to learn that owning a gun is not an innocent act." That proposition is simply not supported by common experience. Guns in general are not "deleterious devices or products or obnoxious waste materials," *International Minerals,* *supra*, at 565, that put their owners on notice that they stand "in responsible relation to a public danger," *Dotterweich*, 320 U. S., at 281.

The Government protests that guns, unlike food stamps, but like grenades and narcotics, are potentially harmful devices.[5] Under this view, it seems that *Liparota*'s concern for criminalizing ostensibly innocuous conduct is inapplicable whenever an item is sufficiently dangerous—that is, dangerousness alone should alert an individual to probable regulation and justify treating a statute that regulates the dangerous device as dispensing with *mens rea*. But that an item is "dangerous," in some general sense, does not necessarily suggest, as the Government seems to assume, that it is not also entirely innocent. Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation. As suggested above, despite their potential for harm, guns generally can be owned in perfect innocence. Of course, we might surely classify certain categories of guns—no doubt including the machineguns, sawed-off shotguns, and artillery pieces that Congress has subjected to regulation—as items the ownership of which would have the same quasi-suspect character we attributed to owning hand grenades in *Freed.* But precisely because guns falling outside those categories traditionally have been widely accepted as lawful possessions, their destructive potential, while perhaps even greater than that of some items we would classify along with narcotics and hand grenades, cannot be said to put gun owners sufficiently on notice of the likelihood of regulation to justify interpreting § 5861(d) as not requiring proof of knowledge of a weapon's characteristics.[6]

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[5] The dissent's assertions to the contrary notwithstanding, the Government's position, "[a]ccurately identified," *post*, at 632, is precisely that "guns in general" are dangerous items. The Government, like the dissent, cites *Sipes* v. *United States*, 321 F. 2d 174, 179 (CA8), cert. denied, 375 U. S. 913 (1963), for the proposition that a defendant's knowledge that the item he possessed "was a gun" is sufficient for a conviction under § 5861(d). Brief for United States 21. Indeed, the Government argues that "guns" should be placed in the same category as the misbranded drugs in *Dotterweich* and the narcotics in *Balint* because "'one would hardly be surprised to learn' (*Freed*, 401 U. S. at 609) that there are laws that affect one's rights of gun ownership." Brief for United States 22. The dissent relies upon the Government's repeated contention that the statute requires knowledge that "the item at issue was highly dangerous and of a type likely to be subject to regulation." *Id.*, at 9. But that assertion merely patterns the general language we have used to describe the *mens rea* requirement in public welfare offenses and amounts to no more than an assertion that the statute should be treated as defining a public welfare offense.

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[6] The dissent asserts that the question is not whether all guns are deleterious devices, but whether a gun "such as the one possessed by petitioner," *post,* at 632 (which the dissent characterizes as a "semiautomatic weapon that [is] readily convertible into a machinegun," *post,* at 624, 633, 640), is such a device. If the dissent intends to suggest that the category of readily convertible semiautomatics provides the benchmark for defining the knowledge requirement for § 5861(d), it is difficult to see how it derives that class of weapons as a standard. As explained above, see n. 5, *supra,* the Government's argument has nothing to do with this ad hoc category of weapons. And the statute certainly does not suggest that any significance should attach to readily convertible semiautomatics, for that class bears no relation to the definitions in the Act. Indeed, in the absence of any definition, it is not at all clear what the contours of this category would be. The parties assume that virtually *all* semiautomatics may be converted into automatics, and limiting the class to those "readily" convertible provides no real guidance concerning the required *mens rea.* In short, every owner of a semiautomatic rifle or handgun would potentially meet such a *mens rea* test.

But the dissent apparently does not conceive of the *mens rea* requirement in terms of specific categories of weapons at all, and rather views it as a more fluid concept that does not require delineation of any concrete elements of knowledge that will apply consistently from case to case. The dissent sees no need to define a class of items the knowing possession of which satisfies the *mens rea* element of the offense, for in the dissent's view the exact content of the knowledge requirement can be left to the jury in each case. As long as the jury concludes that the item in a given case is "sufficiently dangerous to alert [the defendant] to the likelihood of regulation," *post,* at 637, the knowledge requirement is satisfied. See also *post,* at 624, 639, 640. But the *mens rea* requirement under a criminal statute is a question of law, to be determined by the court. Our decisions

On a slightly different tack, the Government suggests that guns are subject to an array of regulations at the federal, state, and local levels that put gun owners on notice that they must determine the characteristics of their weapons and comply with all legal requirements.[7] But regulation in itself is not sufficient to place gun ownership in the category of the sale of narcotics in *Balint*. The food stamps at issue in *Liparota* were subject to comprehensive regulations, yet we did not understand the statute there to dispense with a *mens rea* requirement. Moreover, despite the overlay of legal restrictions on gun ownership, we question whether regulations on guns are sufficiently intrusive that they impinge upon the common experience that owning a gun is usually licit and blameless conduct. Roughly 50 percent of

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suggesting that public welfare offenses require that the defendant know that he stands in "responsible relation to a public danger," *Dotterweich*, 320 U. S., at 281, in no way suggest that what constitutes a public danger is a jury question. It is for courts, through interpretation of the statute, to define the *mens rea* required for a conviction. That task cannot be reduced to setting a general "standard," *post*, at 637, that leaves it to the jury to determine, based presumably on the jurors' personal opinions, whether the items involved in a particular prosecution are sufficiently dangerous to place a person on notice of regulation.

Moreover, as our discussion above should make clear, to determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in "responsible relation to a public danger." *Dotterweich*, *supra*, at 281. The truncated *mens rea* requirement we have described applies precisely because the *court* has determined that the statute regulates in a field where knowing possession of some general class of items should alert individuals to probable regulation. Under the dissent's approach, however, it seems that every regulatory statute potentially could be treated as a public welfare offense as long as the jury—not the court—ultimately determines that the specific items involved in a prosecution were sufficiently dangerous.

[7] See, *e. g.*, 18 U. S. C. §§ 921–928 (1988 ed. and Supp. IV) (requiring licensing of manufacturers, importers, and dealers of guns and regulating the sale, possession, and interstate transportation of certain guns).

American homes contain at least one firearm of some sort,[8] and in the vast majority of States, buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.[9]

If we were to accept as a general rule the Government's suggestion that dangerous and regulated items place their owners under an obligation to inquire at their peril into compliance with regulations, we would undoubtedly reach some untoward results. Automobiles, for example, might also be termed "dangerous" devices and are highly regulated at both the state and federal levels. Congress might see fit to criminalize the violation of certain regulations concerning automobiles, and thus might make it a crime to operate a vehicle without a properly functioning emission control system. But we probably would hesitate to conclude on the basis of silence that Congress intended a prison term to apply to a car owner whose vehicle's emissions levels, wholly unbeknownst to him, began to exceed legal limits between regular inspection dates.

Here, there can be little doubt that, as in *Liparota*, the Government's construction of the statute potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent.[10] The Government does not dispute the contention that virtually any semiautomatic weapon may be converted, either by internal modification or, in some cases, simply by wear and tear, into a machinegun within the meaning of the Act. Cf. *United States* v. *Anderson,* 885 F. 2d 1248, 1251, 1253–1254 (CA5 1989) (en banc). Such a gun may give no externally visible indication that it is fully automatic. See *United States* v. *Herbert,* 698 F. 2d 981, 986 (CA9), cert. denied, 464 U. S. 821 (1983). But in the Government's view, any person who has purchased what he believes to be a semiautomatic rifle or handgun, or who simply has inherited a gun from a relative and left it untouched in an attic or basement, can be subject to imprisonment, despite absolute ignorance of the gun's firing capabilities, if the gun turns out to be an automatic.

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[8] See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 209 (1992) (Table 2.58).

[9] For example, as of 1990, 39 States allowed adult residents, who are not felons or mentally infirm, to purchase a rifle or shotgun simply with proof of identification (and in some cases a simultaneous application for a permit). See U. S. Dept. of Justice, Bureau of Justice Statistics, Identifying Persons, Other Than Felons, Ineligible to Purchase Firearms 114, Exh. B.4 (1990); U. S. Congress, Office of Technology Assessment, Automated Record Checks of Firearm Purchasers 27 (July 1991). See also M. Cooper, Reassessing the Nation's Gun Laws, Editorial Research Reports 158, 160 (Jan.–Mar. 1991) (table) (suggesting the total is 41 States); Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, State Laws and Published Ordinances—Firearms (19th ed. 1989).

We concur in the Fifth Circuit's conclusion on this point: "It is unthinkable to us that Congress intended to subject such law-abiding, well-intentioned citizens to a possible ten-year term of imprisonment if . . . what they genuinely and reasonably believed was a conventional semi-automatic [weapon] turns out to have worn down into or been secretly modified to be a fully automatic weapon." *Anderson, supra,* at 1254. As we noted in *Morissette,* the "purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction." 342 U. S., at 263.[11] We are reluctant to impute that purpose to

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[10] We, of course, express no view concerning the inferences a jury may have drawn regarding petitioner's knowledge from the evidence in this case.

[11] The Government contends that Congress intended precisely such an aid to obtaining convictions, because requiring proof of knowledge would place too heavy a burden on the Government and obstruct the proper functioning of § 5861(d). Cf. *United States* v. *Balint,* 258 U. S. 250, 254 (1922) (difficulty of proving knowledge suggests Congress did not intend to require *mens rea*). But knowledge can be inferred from circumstantial

Congress where, as here, it would mean easing the path to convicting persons whose conduct would not even alert them to the probability of strict regulation in the form of a statute such as § 5861(d).

C

The potentially harsh penalty attached to violation of § 5861(d)—up to 10 years' imprisonment—confirms our reading of the Act. Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with *mens rea*. Certainly, the cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. See, *e. g., Commonwealth* v. *Raymond*, 97 Mass. 567 (1867) (fine of up to $200 or six months in jail, or both); *Commonwealth* v. *Farren*, 91 Mass. 489 (1864) (fine); *People* v. *Snowburger*, 113 Mich. 86, 71 N. W. 497 (1897) (fine of up to $500 or incarceration in county jail).[12]

As commentators have pointed out, the small penalties attached to such offenses logically complemented the absence of a *mens rea* requirement: In a system that generally re-

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evidence, including any external indications signaling the nature of the weapon. And firing a fully automatic weapon would make the regulated characteristics of the weapon immediately apparent to its owner. In short, we are confident that when the defendant knows of the characteristics of his weapon that bring it within the scope of the Act, the Government will not face great difficulty in proving that knowledge. Of course, if Congress thinks it necessary to reduce the Government's burden at trial to ensure proper enforcement of the Act, it remains free to amend § 5861(d) by explicitly eliminating a *mens rea* requirement.

[12] Leading English cases developing a parallel theory of regulatory offenses similarly involved violations punishable only by fine or short-term incarceration. See, *e. g., Queen* v. *Woodrow*, 15 M. & W. 404, 153 Eng. Rep. 907 (Ex. 1846) (fine of £200 for adulterated tobacco); *Hobbs* v. *Winchester Corp.*, [1910] 2 K. B. 471 (maximum penalty of three months' imprisonment for sale of unwholesome meat).

quires a "vicious will" to establish a crime, 4 W. Blackstone, Commentaries *21, imposing severe punishments for offenses that require no *mens rea* would seem incongruous. See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 70 (1933). Indeed, some courts justified the absence of *mens rea* in part on the basis that the offenses did not bear the same punishments as "infamous crimes," *Tenement House Dept.* v. *McDevitt*, 215 N. Y. 160, 168, 109 N. E. 88, 90 (1915) (Cardozo, J.), and questioned whether imprisonment was compatible with the reduced culpability required for such regulatory offenses. See, *e. g., People ex rel. Price* v. *Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 32–33, 121 N. E. 474, 477 (1918) (Cardozo, J.); *id.*, at 35, 121 N. E., at 478 (Crane, J., concurring) (arguing that imprisonment for a crime that requires no *mens rea* would stretch the law regarding acts *mala prohibita* beyond its limitations).[13] Similarly, commentators collecting the early cases have argued that offenses punishable by imprisonment cannot be understood to be public welfare offenses, but must require *mens rea*. See R. Perkins, Criminal Law 793–798 (2d ed. 1969) (suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare offense); Sayre, *supra*, at 72 ("Crimes punishable with prison sentences . . . ordinarily require proof of a guilty intent").[14]

In rehearsing the characteristics of the public welfare offense, we, too, have included in our consideration the punishments imposed and have noted that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette,* 342 U. S., at 256.[15] We have even recognized that it was "[u]nder such considerations" that courts have construed statutes to dispense with *mens rea. Ibid.*

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[13] Cf. *Queen* v. *Tolson*, 23 Q. B., at 177 (Wills, J.) (In determining whether a criminal statute dispenses with *mens rea*, "the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest").

[14] But see, *e. g., State* v. *Lindberg*, 125 Wash. 51, 215 P. 41 (1923) (applying the public welfare offense rationale to a felony).

Our characterization of the public welfare offense in *Morissette* hardly seems apt, however, for a crime that is a felony, as is violation of § 5861(d).[16] After all, "felony" is, as we noted in distinguishing certain common-law crimes from public welfare offenses, " 'as bad a word as you can give to man or thing.' " *Id.,* at 260 (quoting 2 F. Pollock & F. Maitland, History of English Law 465 (2d ed. 1899)). Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea.* But see *United States* v. *Balint,* 258 U. S. 250 (1922).

We need not adopt such a definitive rule of construction to decide this case, however. Instead, we note only that where, as here, dispensing with *mens rea* would require the defendant to have knowledge only of traditionally lawful conduct, a severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement. In such a case, the usual presumption that a defendant must know the facts that make his conduct illegal should apply.

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[15] See also *United States Gypsum,* 438 U. S., at 442, n. 18 (noting that an individual violation of the Sherman Antitrust Act is a felony punishable by three years in prison or a fine not exceeding $100,000 and stating that "[t]he severity of these sanctions provides further support for our conclusion that the [Act] should not be construed as creating strict-liability crimes"). Cf. *Holdridge* v. *United States,* 282 F. 2d 302, 310 (CA8 1960) (Blackmun, J.) ("[W]here a federal criminal statute omits mention of intent and . . . where the penalty is relatively small, where conviction does not gravely besmirch, [and] where the statutory crime is not one taken over from the common law, . . . the statute can be construed as one not requiring criminal intent").

[16] Title 18 U. S. C. § 3559 makes any crime punishable by more than one year in prison a felony.

III

In short, we conclude that the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d) in this case. Silence does not suggest that Congress dispensed with *mens rea* for the element of § 5861(d) at issue here. Thus, to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR–15 that brought it within the scope of the Act.[17]

We emphasize that our holding is a narrow one. As in our prior cases, our reasoning depends upon a commonsense evaluation of the nature of the particular device or substance Congress has subjected to regulation and the expectations that individuals may legitimately have in dealing with the regulated items. In addition, we think that the penalty attached to § 5861(d) suggests that Congress did not intend to eliminate a *mens rea* requirement for violation of the section. As we noted in *Morissette:* "Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not." 342 U. S., at 260. We attempt no definition here, either. We note only that our holding depends critically on our view that if Congress had intended to make outlaws of gun owners who were wholly ignorant of the offending characteristics of their weapons, and to subject them to lengthy prison terms, it would have spoken more clearly to that effect. Cf. *United States* v. *Harris,* 959 F. 2d 246, 261 (CADC), cert. denied, 506 U. S. 932 (1992).

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[17] In reaching our conclusion, we find it unnecessary to rely on the rule of lenity, under which an ambiguous criminal statute is to be construed in favor of the accused. That maxim of construction "is reserved for cases where, '[a]fter "seiz[ing] every thing from which aid can be derived,"' the Court is 'left with an ambiguous statute.'" *Smith* v. *United States*, 508 U. S. 223, 239 (1993) (quoting *United States* v. *Bass*, 404 U. S. 336, 347 (1971), in turn quoting *United States* v. *Fisher*, 2 Cranch 358, 386 (1805)). See also *United States* v. *R. L. C.*, 503 U. S. 291, 311 (1992) (THOMAS, J., concurring in part and concurring in judgment); *Chapman* v. *United States*, 500 U. S. 453, 463 (1991) (rule of lenity inapplicable unless there is a "'grievous ambiguity or uncertainty'" in the statute). Here, the background rule of the common law favoring *mens rea* and the substantial body of precedent we have developed construing statutes that do not specify a mental element provide considerable interpretive tools from which we can "seize aid," and they do not leave us with the ultimate impression that § 5861(d) is "grievous[ly]" ambiguous. Certainly, we have not concluded in the past that statutes silent with respect to *mens rea* are ambiguous. See, *e. g., United States* v. *Balint*, 258 U. S. 250 (1922).

For the foregoing reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE GINSBURG, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

The statute petitioner Harold E. Staples is charged with violating, 26 U. S. C. § 5861(d), makes it a crime for any person to "receive or possess a firearm which is not registered to him." Although the word "knowingly" does not appear in the statute's text, courts generally assume that Congress, absent a contrary indication, means to retain a *mens rea* requirement. *Ante,* at 606; see *Liparota* v. *United States,* 471 U. S. 419, 426 (1985); *United States* v. *United States Gypsum Co.,* 438 U. S. 422, 437–438 (1978).[1] Thus, our holding in *United States* v. *Freed,* 401 U. S. 601 (1971), that § 5861(d) does not require proof of knowledge that the firearm is unregistered, rested on the premise that the defendant indeed knew the items he possessed were hand grenades. *Id.*, at 607; *id.*, at 612 (Brennan, J., concurring in judgment) ("The Government and the Court agree that the prosecutor must prove knowing possession of the items and also knowledge that the items possessed were hand grenades.").

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[1] Contrary to the dissent's suggestion, we have not confined the presumption of *mens rea* to statutes codifying traditional common-law offenses, but have also applied the presumption to offenses that are "entirely a creature of statute," *post,* at 625, such as those at issue in *Liparota, Gypsum,* and, most recently, *Posters 'N' Things, Ltd.* v. *United States, ante,* at 522–523.

Conviction under § 5861(d), the Government accordingly concedes, requires proof that Staples "knowingly" possessed the machinegun. Brief for United States 23. The question before us is not *whether* knowledge of possession is required, but what level of knowledge suffices: (1) knowledge simply of possession of the object; (2) knowledge, in addition, that the object is a dangerous weapon; (3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation, for example, awareness that the weapon is a machinegun.[2]

Recognizing that the first reading effectively dispenses with *mens rea*, the Government adopts the second, contending that it avoids criminalizing "apparently innocent conduct," *Liparota, supra*, at 426, because under the second reading, "a defendant who possessed what he thought was a toy or a violin case, but which in fact was a machinegun, could not be convicted." Brief for United States 23. The Government, however, does not take adequate account of the "widespread lawful gun ownership" Congress and the States have allowed to persist in this country. See *United States* v. *Harris*, 959 F. 2d 246, 261 (CADC) *(per curiam)*, cert. denied, 506 U. S. 932 (1992). Given the notable lack of comprehensive regulation, "mere unregistered possession of certain types of [regulated weapons]—often [difficult to distinguish] from other, [nonregulated] types," has been held inadequate to establish the requisite knowledge. See 959 F. 2d, at 261.

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[2] Some Courts of Appeals have adopted a variant of the third reading, holding that the Government must show that the defendant knew the gun was a machinegun, but allowing inference of the requisite knowledge where a visual inspection of the gun would reveal that it has been converted into an automatic weapon. See *United States* v. *O'Mara*, 963 F. 2d 1288, 1291 (CA9 1992); *United States* v. *Anderson*, 885 F. 2d 1248, 1251 (CA5 1989) (en banc).

The Nation's legislators chose to place under a registration requirement only a very limited class of firearms, those they considered especially dangerous. The generally "dangerous" character of all guns, the Court therefore observes, *ante*, at 611–612, did not suffice to give individuals in Staples' situation cause to inquire about the need for registration. Cf. *United States* v. *Balint*, 258 U. S. 250 (1922) (requiring reporting of sale of strictly regulated narcotics, opium and cocaine). Only the third reading, then, suits the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity.[3]

The indictment in Staples' case charges that he "knowingly received and possessed firearms." 1 App. to Brief for Appellant in No. 91–5033 (CA10), p. 1.[4] "Firearms" has a circumscribed statutory definition. See 26 U. S. C. § 5845(a). The "firear[m]" the Government contends Staples possessed in violation of § 5861(d) is a machinegun. See § 5845(a)(6). The indictment thus effectively charged that Staples *knowingly possessed a machinegun.* "Knowingly possessed" logically means "possessed and knew that he possessed." The Government can reconcile the jury instruction[5] with the indictment only on the implausible assumption that the term "firear[m]" has two different meanings when used once in the same charge—simply "gun" when referring to what petitioner knew, and "machinegun" when referring to what he possessed. See Cunningham, Levi, Green, & Kaplan, Plain Meaning and Hard Cases, 103 Yale L. J. 1561, 1576–1577 (1994); cf. *Ratzlaf* v. *United States*, 510 U. S. 135, 143 (1994) (construing statutory term to bear same meaning "each time it is called into play").

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[3] The *mens rea* presumption requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption, "deeply rooted in the American legal system," that, ordinarily, "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Cheek* v. *United States*, 498 U. S. 192, 199 (1991). Cf. *United States* v. *Freed*, 401 U. S. 601, 612 (1971) (Brennan, J., concurring in judgment) ("If the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy."). The maxim explains why some "innocent" actors—for example, a defendant who knows he possesses a weapon with all of the characteristics that subject it to registration, but was unaware of the registration requirement, or thought the gun was registered—may be convicted under § 5861(d), see *post*, at 638. Knowledge of whether the gun was registered is so closely related to knowledge of the registration requirement that requiring the Government to prove the former would in effect require it to prove knowledge of the law. Cf. *Freed*, *supra*, at 612–614 (Brennan, J., concurring in judgment).

[4] The indictment charged Staples with possession of two unregistered machineguns, but the jury found him guilty of knowingly possessing only one of them. Tr. 477.

For these reasons, I conclude that conviction under § 5861(d) requires proof that the defendant knew he possessed not simply a gun, but a machinegun. The indictment in this case, but not the jury instruction, properly described this knowledge requirement. I therefore concur in the Court's judgment.

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[5] The trial court instructed the jury:

"[A] person is knowingly in possession of a thing if his possession occurred voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word 'knowingly' is to insure that no one can be convicted of possession of a firearm he did not intend to possess. The Government need not prove the defendant knows he's dealing with a weapon possessing every last characteristic [which subjects it] to the regulation. It would be enough to prove he knows that he is dealing with a dangerous device of a type as would alert one to the likelihood of regulation. If he has such knowledge and if the particular item is, in fact, regulated, then that person acts at his peril. Mere possession of an unregistered firearm is a violation of the law of the United States, and it is not necessary for the Government to prove that the defendant knew that the weapon in his possession was a firearm within the meaning of the statute, only that he knowingly possessed the firearm." *Id.*, at 465.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed-off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the National Firearms Act (or Act). Because the Court's addition to the text of 26 U. S. C. § 5861(d) is foreclosed by both the statute and our precedent, I respectfully dissent.

The Court is preoccupied with guns that "generally can be owned in perfect innocence." *Ante,* at 611. This case, however, involves a semiautomatic weapon that was readily convertible into a machinegun—a weapon that the jury found to be "'a dangerous device of a type as would alert one to the likelihood of regulation.'" *Ante,* at 604. These are not guns "of some sort" that can be found in almost "50 percent of American homes." *Ante,* at 613–614.[1] They are particularly dangerous—indeed, a substantial percentage of the unregistered machineguns now in circulation are converted semiautomatic weapons.[2]

The question presented is whether the National Firearms Act imposed on the Government the burden of proving beyond a reasonable doubt not only that the defendant knew he possessed a dangerous device sufficient to alert him to regulation, but also that he knew it had all the characteristics of a "firearm" as defined in the statute. Three unambiguous guideposts direct us to the correct answer to that question: the text and structure of the Act, our cases construing both this Act and similar regulatory legislation, and the Act's history and interpretation.

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[1] Indeed, only about 15 percent of all the guns in the United States are semiautomatic. See National Rifle Association, Fact Sheet, Semi-Automatic Firearms 1 (Feb. 1, 1994). Although it is not known how many of those weapons are readily convertible into machineguns, it is obviously a lesser share of the total.

[2] See U. S. Dept. of Justice, Attorney General's Task Force on Violent Crime: Final Report 29, 32 (Aug. 17, 1981) (stating that over an 18-month period over 20 percent of the machineguns seized or purchased by the Bureau of Alcohol, Tobacco and Firearms had been converted from semiautomatic weapons by "simple tool work or the addition of readily available parts") (citing U. S. Dept. of Treasury, Bureau of Alcohol, Tobacco and Firearms, Firearms Case Summary (Washington: U. S. Govt. Printing Office 1981)).

I

Contrary to the assertion by the Court, the text of the statute does provide "explicit guidance in this case." Cf. *ante*, at 605. The relevant section of the Act makes it "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record." 26 U. S. C. § 5861(d). Significantly, the section contains no knowledge requirement, nor does it describe a common-law crime.

The common law generally did not condemn acts as criminal unless the actor had "an evil purpose or mental culpability," *Morissette* v. *United States*, 342 U. S. 246, 252 (1952), and was aware of all the facts that made the conduct unlawful, *United States* v. *Balint*, 258 U. S. 250, 251–252 (1922). In interpreting statutes that codified traditional common-law offenses, courts usually followed this rule, even when the text of the statute contained no such requirement. *Ibid.* Because the offense involved in this case is entirely a creature of statute, however, "the background rules of the common law," cf. *ante*, at 605, do not require a particular construction, and critically different rules of construction apply. See *Morissette* v. *United States*, 342 U. S., at 252–260.

In *Morissette*, Justice Jackson outlined one such interpretive rule:

> "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already . . . well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an of-

> fense new to general law, for whose definition the courts have no guidance except the Act." *Id.*, at 262.

Although the lack of an express knowledge requirement in § 5861(d) is not dispositive, see *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 438 (1978), its absence suggests that Congress did not intend to require proof that the defendant knew all of the facts that made his conduct illegal.[3]

The provision's place in the overall statutory scheme, see *Crandon* v. *United States*, 494 U. S. 152, 158 (1990), confirms this intention. In 1934, when Congress originally enacted the statute, it limited the coverage of the 1934 Act to a relatively narrow category of weapons such as submachineguns and sawed-off shotguns—weapons characteristically used only by professional gangsters like Al Capone, Pretty Boy Floyd, and their henchmen.[4] At the time, the Act would have had little application to guns used by hunters or guns kept at home as protection against unwelcome intruders.[5]

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[3] The Seventh Circuit's comment in a similar case is equally apt here: "The crime is possessing an unregistered firearm—not 'knowingly' possessing an unregistered firearm, or possessing a weapon knowing it to be a firearm, or possessing a firearm knowing it to be unregistered. . . . [Petitioner's] proposal is not that we *interpret* a knowledge or intent requirement in § 5861(d); it is that we *invent* one." *United States* v. *Ross*, 917 F. 2d 997, 1000 (1990) *(per curiam)* (emphasis in original), cert. denied, 498 U. S. 1122 (1991).

[4] "The late 1920s and early 1930s brought . . . a growing perception of crime both as a major problem and as a national one. . . . [C]riminal gangs found the submachinegun (a fully automatic, shoulder-fired weapon utilizing automatic pistol cartridges) and sawed-off shotgun deadly for close-range fighting." Hardy, The Firearms Owners' Protection Act: A Historical and Legal Perspective, 17 Cumb. L. Rev. 585, 590 (1987).

[5] The Senate Report on the bill explained: "The gangster as a law violator must be deprived of his most dangerous weapon, the machinegun. Your committee is of the opinion that limiting the bill to the taxing of sawed-off guns and machineguns is sufficient at this time. It is not thought necessary to go so far as to include pistols and revolvers and sporting arms. But while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction,

Congress therefore could reasonably presume that a person found in possession of an unregistered machinegun or sawed-off shotgun intended to use it for criminal purposes. The statute as a whole, and particularly the decision to criminalize mere possession, reflected a legislative judgment that the likelihood of innocent possession of such an unregistered weapon was remote, and far less significant than the interest in depriving gangsters of their use.

In addition, at the time of enactment, this Court had already construed comparable provisions of the Harrison Anti-Narcotic Act not to require proof of knowledge of all the facts that constitute the proscribed offense. *United States* v. *Balint*, 258 U. S. 250 (1922).[6] Indeed, Attorney General Cummings expressly advised Congress that the text of the gun control legislation deliberately followed the language of the Anti-Narcotic Act to reap the benefit of cases construing it.[7] Given the reasoning of *Balint*, we properly may infer that Congress did not intend the Court to read a stricter knowledge requirement into the gun control legislation than we read into the Anti-Narcotic Act. *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979).

Like the 1934 Act, the current National Firearms Act is primarily a regulatory measure. The statute establishes

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there is no reason why anyone except a law officer should have a machinegun or sawed-off shotgun." S. Rep. No. 1444, 73d Cong., 2d Sess., 1–2 (1934).

[6] In the *Balint* case, after acknowledging the general common-law rule that made knowledge of the facts an element of every crime, we held that as to statutory crimes the question is one of legislative intent, and that the Anti-Narcotic Act should be construed to authorize "punishment of a person for an act in violation of law[,] [even] when ignorant of the facts making it so." *Balint*, 258 U. S., at 251–252. The "policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells." *Id.*, at 253.

[7] See National Firearms Act: Hearings on H. R. 9066 before the House Committee on Ways and Means, 73d Cong., 2d Sess., 6 (1934).

taxation, registration, reporting, and recordkeeping requirements for businesses and transactions involving statutorily defined firearms, and requires that each firearm be identified by a serial number. 26 U. S. C. §§5801–5802, 5811–5812, 5821–5822, 5842–5843. The Secretary of the Treasury must maintain a central registry that includes the names and addresses of persons in possession of all firearms not controlled by the Government. §5841. Congress also prohibited certain acts and omissions, including the possession of an unregistered firearm.[8] §5861.

As the Court acknowledges, *ante,* at 607, to interpret statutory offenses such as §5861(d), we look to "the nature of the statute and the particular character of the items regulated" to determine the level of knowledge required for conviction. An examination of §5861(d) in light of our precedent dictates that the crime of possession of an unregistered machinegun is in a category of offenses described as "public welfare" crimes.[9] Our decisions interpreting such offenses clearly require affirmance of petitioner's conviction.

II

"Public welfare" offenses share certain characteristics: (1) they regulate "dangerous or deleterious devices or products or obnoxious waste materials," see *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 565 (1971); (2) they "heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare," *Morissette*, 342 U. S., at 254; and (3) they "depend on no mental element but consist only of forbidden acts or omissions," *id.*, at 252–253. Examples of such offenses include Congress' exertion of its power to keep dangerous narcotics,[10] hazardous substances,[11] and impure and adulterated foods and drugs[12] out of the channels of commerce.[13]

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[8] "Omission of a mental element is the norm for statutes designed to deal with inaction. *Not* registering your gun, *not* cleaning up your warehouse, *United States* v. *Park,* 421 U. S. 658 . . . (1975), and like 'acts' are done without thinking. Often the omission occurs because of lack of attention. . . . Yet Congress may have sound reasons for requiring people to investigate and act, objectives that cannot be achieved if the courts add mental elements to the statutes." *Ross,* 917 F. 2d, at 1000.

[9] These statutes are sometimes referred to as "strict liability" offenses. As the Court notes, because the defendant must know that he is engaged in the type of dangerous conduct that is likely to be regulated, the use of the term "strict liability" to describe these offenses is inaccurate. *Ante,* at 607–608, n. 3. I therefore use the term "public welfare offense" to describe this type of statute.

Public welfare statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liparota* v. *United States*, 471 U. S. 419, 433 (1985). Thus, under such statutes, "a defendant can be convicted even though he was unaware of the circumstances of his conduct that made it illegal." *Id.*, at 443, n. 7 (White, J., dissenting). Referring to the strict criminal sanctions for unintended violations of the food and drug laws, Justice Frankfurter wrote:

> "The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should in-

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[10] See *United States* v. *Balint*, 258 U. S. 250 (1922).

[11] See *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558 (1971).

[12] See *United States* v. *Dotterweich*, 320 U. S. 277 (1943).

[13] The Court in *Morissette* v. *United States*, 342 U. S. 246 (1952), expressing approval of our public welfare offense cases, stated:

"Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static." *Id.*, at 260 (footnotes omitted).

> fuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words. The prosecution . . . is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct—awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *United States* v. *Dotterweich,* 320 U. S. 277, 280–281 (1943) (citing *United States* v. *Balint,* 258 U. S. 250 (1922); other citations omitted).

The National Firearms Act unquestionably is a public welfare statute. *United States* v. *Freed,* 401 U. S. 601, 609 (1971) (holding that this statute "is a regulatory measure in the interest of the public safety"). Congress fashioned a legislative scheme to regulate the commerce and possession of certain types of dangerous devices, including specific kinds of weapons, to protect the health and welfare of the citizenry. To enforce this scheme, Congress created criminal penalties for certain acts and omissions. The text of some of these offenses—including the one at issue here—contains no knowledge requirement.

The Court recognizes:

> "[W]e have reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' *Dotterweich, supra,* at 281, he should be alerted to the probability of strict regulation, and we have assumed that in such cases Congress intended to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibition of the statute.' *Balint,* 258 U. S., at 254." *Ante,* at 607.

We thus have read a knowledge requirement into public welfare crimes, but not a requirement that the defendant know all the facts that make his conduct illegal. Although the Court acknowledges this standard, it nevertheless concludes that a gun is not the type of dangerous device that would alert one to the possibility of regulation.

Both the Court and JUSTICE GINSBURG erroneously rely upon the "tradition[al]" innocence of gun ownership to find that Congress must have intended the Government to prove knowledge of all the characteristics that make a weapon a statutory "firear[m]." *Ante,* at 610–612; *ante,* at 621–622 (GINSBURG, J., concurring in judgment). We held in *Freed,* however, that a § 5861(d) offense may be committed by one with no awareness of either wrongdoing or of all the facts that constitute the offense.[14] 401 U. S., at 607–610. Nevertheless, the Court, asserting that the Government "gloss[es] over the distinction between grenades and guns," determines that "the gap between *Freed* and this case is too wide to bridge." *Ante,* at 610. As such, the Court instead reaches the rather surprising conclusion that guns are more analogous to food stamps than to hand grenades.[15] Even if one accepts that dubious proposition, the Court founds it upon a faulty premise: its mischaracterization of the Government's submission as one contending that "*all guns* . . . are dangerous devices that put gun owners on notice . . . ." *Ante*, at 608 (emphasis added).[16] Accurately identified, the Government's position presents the question whether guns such as the one possessed by petitioner " 'are highly dangerous offensive weapons, no less dangerous than the narcotics' " in *Balint* or the hand grenades in *Freed*, see *ante*, at 609 (quoting *Freed*, 401 U. S., at 609).[17]

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[14] *Freed,* 401 U. S., at 607 (holding that a violation of § 5861(d) may be established without proof that the defendant was aware of the fact that the firearm he possessed was unregistered). Our holding in *Freed* is thus squarely at odds with the Court's conclusion that the "defendant must know the facts that make his conduct illegal," *ante,* at 619.

[15] The Court's and JUSTICE GINSBURG's reliance upon *Liparota* v. *United States,* 471 U. S. 419 (1985), is misplaced. *Ante,* at 610–612; *ante,* at 621–622. Although the Court is usually concerned with fine nuances of statutory text, its discussion of *Liparota* simply ignores the fact that the food stamp fraud provision, unlike § 5861(d), contained the word "knowingly." The Members of the Court in *Liparota* disagreed on the proper interpretation. The dissenters accepted the Government's view that the term merely required proof that the defendant had knowledge of the facts that constituted the crime. See *Liparota,* 471 U. S., at 442–443 (White, J., dissenting) ("I would read § 2024(b)(1) . . . to require awareness of only the relevant aspects of one's conduct rendering it illegal, not the

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fact of illegality"). The majority, however, concluded that "knowingly" also connoted knowledge of illegality. *Id.*, at 424–425. Because neither "knowingly" nor any comparable term appears in § 5861(d), the statute before us today requires even less proof of knowledge than the dissenters would have demanded in *Liparota*.

[16] JUSTICE GINSBURG similarly assumes that the character of "*all guns*" cannot be said to place upon defendants an obligation "to inquire about the need for registration." *Ante*, at 622 (emphasis added).

[17] The Government does note that some Courts of Appeals have required proof of knowledge only that "the weapon was 'a firearm, within the general meaning of that term,' " Brief for United States 24–25 (citing cases). Contrary to the assertion by the Court, *ante*, at 632, n. 5, however, the Government does not advance this test as the appropriate knowledge requirement, but instead supports the one used by other Courts of Appeals. Compare the Court's description of the Government's position, *ibid.*, with the following statements in the Government's brief:

"A defendant may be convicted of such offenses so long as the government proves that he knew the item at issue was highly dangerous and of a type likely to be subject to regulation." Brief for United States 9.

"[T]he court of appeals correctly required the government to prove only that petitioner knew that he possessed a dangerous weapon likely to be subject to regulation." *Id.*, at 13.

"B. The intent requirement applicable to Section 5861(d) is knowledge that one is dealing with a dangerous item of a type likely to be subject to regulation." *Id.*, at 16.

"But where a criminal statute involves regulation of a highly hazardous substance—and especially where it penalizes a failure to act or to comply with a registration scheme—the defendant's knowledge that he was deal-

Thus, even assuming that the Court is correct that the mere possession of an ordinary rifle or pistol does not entail sufficient danger to alert one to the possibility of regulation, that conclusion does not resolve this case. Petitioner knowingly possessed a semiautomatic weapon that was readily convertible into a machinegun. The "'character and nature'" of such a weapon is sufficiently hazardous to place the possessor on notice of the possibility of regulation. See *Posters 'N' Things, Ltd.* v. *United States, ante,* at 525 (citation omitted).[18] No significant difference exists between

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ing with such a substance and that it was likely to be subject to regulation provides sufficient intent to support a conviction." *Id.*, at 17–18.

"Rather, absent contrary congressional direction, knowledge of the highly dangerous nature of the articles involved and the likelihood that they are subject to regulation takes the place of the more rigorous knowledge requirement applicable where apparently innocent and harmless devices are subject to regulation." *Id.*, at 20.

"But the instruction did not require the government to prove that petitioner knew his weapon 'possess[ed] every last characteristic [which subjects it] to regulation'; he need only have 'know[n] that he [was] dealing with a dangerous device of a type as would alert one to the likelihood of regulation.' Tr. 465.

"That instruction accurately describes the mental state necessary for a violation of Section 5861(d)." *Id.*, at 23.

"[P]roof that a defendant was on fair notice that the item he possessed was highly dangerous and likely to be regulated is sufficient to support a conviction." *Id.*, at 24.

[18] The Court and JUSTICE GINSBURG apparently assume that the outer limits of any such notice can be no broader than the category of dangerous objects that Congress delineated as "firearms." *Ante*, at 611–612; *ante*, at 621–622. Our holding in *Posters 'N' Things*, illustrates the error in that assumption. A retailer who may not know whether certain merchandise is actually drug paraphernalia, as that term is defined in the relevant federal statute, may nevertheless violate the law if "aware that customers in general are likely to use the merchandise with drugs." *Ante*, at 524. The owner of a semiautomatic weapon that is readily convertible into a machinegun can certainly be aware of its dangerous nature and the consequent probability of regulation even if he does not know whether the

imposing upon the possessor a duty to determine whether such a weapon is registered, *Freed*, 401 U. S., at 607–610, and imposing a duty to determine whether that weapon has been converted into a machinegun.

Cases arise, of course, in which a defendant would not know that a device was dangerous unless he knew that it was a "firearm" as defined in the Act. *Freed* was such a case; unless the defendant knew that the device in question was a hand grenade, he would not necessarily have known that it was dangerous. But given the text and nature of the statute, it would be utterly implausible to suggest that Congress intended the owner of a sawed-off shotgun to be criminally liable if he knew its barrel was 17.5 inches long but not if he mistakenly believed the same gun had an 18-inch barrel. Yet the Court's holding today assumes that Congress intended that bizarre result.

The enforcement of public welfare offenses always entails some possibility of injustice. Congress nevertheless has repeatedly decided that an overriding public interest in health or safety may outweigh that risk when a person is dealing with products that are sufficiently dangerous or deleterious to make it reasonable to presume that he either knows, or should know, whether those products conform to special regulatory requirements. The dangerous character of the product is reasonably presumed to provide sufficient notice of the probability of regulation to justify strict enforcement against those who are merely guilty of negligent, rather than willful, misconduct.

The National Firearms Act is within the category of public welfare statutes enacted by Congress to regulate highly dangerous items. The Government submits that a conviction under such a statute may be supported by proof that the

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weapon is actually a machinegun. If ignorance of the precise characteristics that render an item forbidden should be a defense, items that are likely to be "drug paraphernalia" are no more obviously dangerous, and thus regulated, than items that are likely to be "firearms."

defendant "knew the item at issue was highly dangerous and of a type likely to be subject to regulation." Brief for United States 9.[19] It is undisputed that the evidence in this case met that standard. Nevertheless, neither JUSTICE THOMAS for the Court nor JUSTICE GINSBURG has explained why such a knowledge requirement is unfaithful to our cases or to the text of the Act.[20] Instead, following the approach of their decision in *United States* v. *Harris*, 959 F. 2d 246, 260–261 (CADC) *(per curiam)*, cert. denied *sub nom. Smith* v. *United States*, 506 U. S. 932 (1992), they have simply explained why, in their judgment, it would be unfair to punish the possessor of this machinegun.

III

The history and interpretation of the National Firearms Act supports the conclusion that Congress did not intend to require knowledge of all the facts that constitute the offense of possession of an unregistered weapon. During the first 30 years of enforcement of the 1934 Act, consistent with the absence of a knowledge requirement and with the reasoning in *Balint,* courts uniformly construed it not to require knowledge of all the characteristics of the weapon that brought it within the statute. In a case decided in 1963, then-Judge Blackmun reviewed the earlier cases and concluded that the defendant's knowledge that he possessed a gun was "all the scienter which the statute requires." *Sipes* v. *United States,* 321 F. 2d 174, 179 (CA8), cert. denied, 375 U. S. 913 (1963).

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[19] As a matter of law, this is the level of knowledge required by the statute. Therefore, contrary to the Court's suggestion, *ante*, at 612, n. 6, I have not left the determination of the "exact content of the knowledge requirement" to the jury. I only leave to the jury its usual function: the application of this legal standard to the facts. In performing this function, juries are frequently required to determine if a law has been violated by application of just such a "general 'standard.'" See, *e. g.*, *Posters 'N' Things*, *ante*, at 523–525; *Miller* v. *California*, 413 U. S. 15, 24 (1973).

[20] The Court also supports its conclusion on the basis of the purported disparity between the penalty provided by this statute and those of other regulatory offenses. Although a modest penalty may indicate that a crime is a public welfare offense, such a penalty is not a requisite characteristic of public welfare offenses. For example, the crime involved in *Balint* involved punishment of up to five years' imprisonment. See *Dotterweich*, 320 U. S., at 285; see also *Morissette*, 342 U. S., at 251, n. 8 (noting that rape of one too young to consent is an offense "in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent"). Moreover, congressional authorization of a range of penalties in some cases—petitioner, for instance, is on probation—demonstrates a recognition that relatively innocent conduct should be punished less severely.

Congress subsequently amended the statute twice, once in 1968 and again in 1986. Both amendments added knowledge requirements to other portions of the Act,[21] but neither the text nor the history of either amendment discloses an intent to add any other knowledge requirement to the possession of an unregistered firearm offense. Given that, with only one partial exception,[22] every federal tribunal to address the question had concluded that proof of knowledge of all the facts constituting a violation was not required for a conviction under § 5861(d),[23] we may infer that Congress intended that interpretation to survive. See *Lorillard* v. *Pons*, 434 U. S. 575, 580 (1978).

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[21] Significantly, in 1968, Congress included a knowledge requirement in §5861(*l*). 26 U. S. C. §5861(*l*) (making it unlawful "to make, or cause the making of, a false entry on any application, return, or record required by this chapter, *knowing* such entry to be false") (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Rodriguez* v. *United States,* 480 U. S. 522, 525 (1987) (internal quotation marks and citations omitted); see also *Lawrence County* v. *Lead-Deadwood School Dist. No. 40–1,* 469 U. S. 256, 267–268 (1985).

[22] *United States* v. *Herbert,* 698 F. 2d 981, 986–987 (CA9), cert. denied, 464 U. S. 821 (1983) (requiring the Government to prove knowledge of all the characteristics of a weapon only when no *external* signs indicated that the weapon was a "firearm"). Not until 1989 did a Court of Appeals adopt the view of the majority today. See *United States* v. *Williams,* 872 F. 2d 773 (CA6).

In short, petitioner's knowledge that he possessed an item that was sufficiently dangerous to alert him to the likelihood of regulation would have supported a conviction during the first half century of enforcement of this statute. Unless application of that standard to a particular case violates the Due Process Clause,[24] it is the responsibility of Congress, not this Court, to amend the statute if Congress deems it unfair or unduly strict.

IV

On the premise that the purpose of the *mens rea* requirement is to avoid punishing people "for apparently innocent activity," JUSTICE GINSBURG concludes that proof of knowledge that a weapon is " 'a dangerous device of a type as would alert one to the likelihood of regulation' " is not an adequate *mens rea* requirement, but that proof of knowledge that the weapon possesses " 'every last characteristic' " that subjects it to regulation is. *Ante*, at 622–623, and n. 5 (GINSBURG, J., concurring in judgment) (quoting the trial court's jury instruction).

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[23] See, *e. g., United States* v. *Gonzalez*, 719 F. 2d 1516, 1522 (CA11 1983), cert. denied, 465 U. S. 1037 (1984); *Morgan* v. *United States*, 564 F. 2d 803, 805–806 (CA8 1977); *United States* v. *Cowper*, 503 F. 2d 130, 132–133 (CA6 1974), cert. denied, 420 U. S. 930 (1975); *United States* v. *DeBartolo*, 482 F. 2d 312, 316 (CA1 1973); *United States* v. *Vasquez*, 476 F. 2d 730, 732 (CA5), cert. denied, 414 U. S. 836 (1973), overruled by *United States* v. *Anderson*, 885 F. 2d 1248 (CA5 1989) (en banc).

And, as I have already noted, *United States* v. *Freed*, 401 U. S. 601 (1971), was consistent with the Government's position here. Although the Government accepted the burden of proving that Freed knew that the item he possessed was a hand grenade, the possessor of an unfamiliar object such as a hand grenade would not know that it was "a dangerous item of a type likely to be subject to regulation," Brief for United States 16; see also *id.*, at 20, 23, 24, unless he knew what it was.

[24] Petitioner makes no such claim in this Court.

Assuming that "innocent activity" describes conduct without any consciousness of wrongdoing, the risk of punishing such activity can be avoided only by reading into the statute the common-law concept of *mens rea:* "an evil purpose or mental culpability." *Morissette,* 342 U. S., at 252.[25] But even petitioner does not contend that the Government must prove guilty intent or intentional wrongdoing. Instead, the "*mens rea*" issue in this case is simply what knowledge requirement, if any, Congress implicitly included in this offense. There are at least five such possible knowledge requirements, four of which entail the risk that a completely innocent mistake will subject a defendant to punishment.

First, a defendant may know that he possesses a weapon with all of the characteristics that make it a "firearm" within the meaning of the statute and also know that it has never been registered, but be ignorant of the federal registration requirement. In such a case, we presume knowledge of the law even if we know the defendant is "innocent" in the sense that JUSTICE GINSBURG uses the word. Second, a defendant may know that he possesses a weapon with all of the characteristics of a statutory firearm and also know that the law requires that it be registered, but mistakenly believe that it is in fact registered. *Freed* squarely holds that this defendant's "innocence" is not a defense. Third, a defendant may know only that he possesses a weapon with all of the characteristics of a statutory firearm. Neither ignorance of the registration requirement nor ignorance of the fact that the weapon is unregistered protects this "innocent" defendant. Fourth, a defendant may know that he possesses a weapon that is sufficiently dangerous to likely be regulated, but not know that it has all the characteristics of a statutory firearm. Petitioner asserts that he is an example of this "innocent" defendant. Fifth, a defendant may know that he possesses an ordinary gun and, being aware of the widespread lawful gun ownership in the country, reasonably assume that there is no need "to inquire about the need for registration." *Ante,* at 622 (GINSBURG, J., concurring in judgment). That, of course, is not this case. See *supra,* at 624, and n. 1.[26]

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[25] Our use of the term *mens rea* has not been consistent. In *Morissette,* we used the term as if it always connoted a form of wrongful intent. In other cases, we employ it simply to mean whatever level of knowledge is required for any particular crime. See, *e. g., United States* v. *Bailey,* 444 U. S. 394, 403 (1980). In this sense, every crime except a true strict-liability offense contains a *mens rea* requirement. For instance, the Court defined *mens rea* in *Liparota* v. *United States,* 471 U. S., at 426, as "knowledge of illegality." In dissent, however, Justice White equated the term with knowledge of the facts that make the conduct illegal. *Id.,* at 442–443. Today, the Court assigns the term the latter definition, *ante,* at 605, but in fact requires proof of knowledge of only some of the facts that constitute the violation, *ante,* at 609 (not requiring proof of knowledge of the fact that the gun is unregistered).

JUSTICE GINSBURG treats the first, second, and third alternatives differently from the fourth and fifth. Her acceptance of knowledge of the characteristics of a statutory "firearm" as a sufficient predicate for criminal liability—despite ignorance of either the duty to register or the fact of nonregistration, or both—must rest on the premise that such knowledge would alert the owner to the likelihood of regulation, thereby depriving the conduct of its "apparen[t] innocen[ce]." Yet in the fourth alternative, a jury determines just such knowledge: that the characteristics of the weapon known to the defendant would alert the owner to the likelihood of regulation.

In short, JUSTICE GINSBURG's reliance on "the purpose of the *mens rea* requirement—to shield people against punishment for apparently innocent activity," *ante,* at 622, neither explains why ignorance of certain facts is a defense although ignorance of others is not, nor justifies her disagreement with the jury's finding that this defendant knew facts that should have caused him to inquire about the need for registration.[27]

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[26] Although I disagree with the assumption that "widespread lawful gun ownership" provides a sufficient reason for believing that there is no need to register guns (there is also widespread lawful automobile ownership), acceptance of that assumption neither justifies the majority's holding nor contradicts my conclusion on the facts of this case.

V

This case presents no dispute about the dangerous character of machineguns and sawed-off shotguns. Anyone in possession of such a weapon is "standing in responsible relation to a public danger." See *Dotterweich,* 320 U. S., at 281 (citation omitted). In the National Firearms Act, Congress determined that the serious threat to health and safety posed by the private ownership of such firearms warranted the imposition of a duty on the owners of dangerous weapons to determine whether their possession is lawful. Semiautomatic weapons that are readily convertible into machineguns are sufficiently dangerous to alert persons who knowingly possess them to the probability of stringent public regulation. The jury's finding that petitioner knowingly possessed "a dangerous device of a type as would alert one to the likelihood of regulation" adequately supports the conviction.

Accordingly, I would affirm the judgment of the Court of Appeals.

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[27] In addition, contrary to JUSTICE GINSBURG's assumption, if one reads the term "firearm" from the quoted section of the indictment to mean "gun," the indictment still charges an offense under § 5861(d) and does not differ from the critical jury instruction. See *ante,* at 622–623. Even if JUSTICE GINSBURG is correct that there is a technical variance, petitioner makes no claim that any such variance prejudiced him. The wording of the indictment, of course, sheds no light on the proper interpretation of the underlying statutory text. Although the repeated use of a term in a *statute* may shed light on the statute's construction, see *Ratzlaf* v. *United States,* 510 U. S. 135, 143 (1994), such use in an indictment is irrelevant to that question.

ASSOCIATED INDUSTRIES OF MISSOURI ET AL. *v.* LOHMAN, DIRECTOR OF REVENUE OF MISSOURI, ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 93–397. Argued March 28, 1994—Decided May 23, 1994

Missouri's uniform, statewide "additional use tax" on goods purchased outside the State and stored, used, or consumed within the State is purportedly designed to "compensate" for the taxes imposed by local jurisdictions within the State on in-state sales of goods. Local sales tax rates, however, vary widely, and in many jurisdictions the use tax exceeds the sales tax. Petitioners—a trade association representing businesses that must collect the additional use tax and a manufacturer that pays it—brought this action in state court, contending that the tax scheme impermissibly discriminates against interstate commerce in violation of the Commerce Clause. The State Circuit Court granted respondents summary judgment. In affirming, the Supreme Court of Missouri reasoned that, because the tax was designed to even exactions on intrastate and interstate trade, the tax scheme should be analyzed under the "compensatory tax" doctrine. The court concluded that, given the high average rate of local jurisdictions' sales taxes, the overall effect of the use tax scheme across the State was to place a lighter aggregate tax burden on interstate commerce than on intrastate commerce, even though in some localities the use tax might exceed the sales tax. The court determined that, in such circumstances, there was no discrimination against interstate commerce on a statewide basis and held that the use tax scheme did not violate the Commerce Clause.

Held: Missouri's use tax scheme impermissibly discriminates against interstate commerce in those localities where the use tax exceeds the sales tax. Pp. 646–657.

(a) Although the compensatory tax doctrine saves from constitutional infirmity a facially discriminatory tax that imposes on interstate commerce the equivalent of an "identifiable and substantially similar tax on intrastate commerce," *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore., ante,* at 103, Missouri's use tax scheme runs afoul of the basic requirement that, for a tax system to be "compensatory," the burdens imposed on interstate and intrastate commerce must be equal, see, *e. g., Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 584–587. Whether the use tax is equal to (or lower than) the local sales tax is a matter of fortuity in Missouri, depending entirely on the locality in which the Missouri purchaser happens to reside. In jurisdictions where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. The State Supreme Court's statewide averaging approach is contrary to this Court's decisions, which have, for example, implicitly rejected any theory that would require aggregating the burdens on commerce across an entire State to determine the constitutionality of an exaction imposed on interstate trade by a particular political subdivision. See *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353, 363. *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 373, distinguished. Requiring equal treatment of intrastate and interstate commerce not only across the State as a whole, but also within each political subdivision of the State, does not effectively eliminate the State's ability to delegate taxing authority to local jurisdictions. It merely prohibits the State from granting its subdivisions a power to discriminate that the State lacked in the first instance. Pp. 646–654.

(b) The Court rejects petitioners' contention that the use tax should be struck down in its entirety. Petitioners argue that the tax should be treated as facially invalid in every jurisdiction because there is no countervailing statewide sales tax and no legislation ensuring that local sales taxes will always equal or exceed the use tax. But it is the actual discrimination that results from the Missouri tax system in some localities, not the potential for discrimination in every locality, that transgresses constitutional commands. See, *e. g., Gregg Dyeing Co.* v. *Query,* 286 U. S. 472, 481. Pp. 654–656.

(c) The effect that any predeprivation procedures provided under state law for contesting the use tax might have on the appropriate remedy in this case, as well as determination of the methods best adapted to implementing a remedy here, are matters best left for consideration on remand. Pp. 656–657.

857 S. W. 2d 182, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and GINSBURG, JJ., joined. BLACKMUN, J., concurred in the judgment.

Thomas C. Walsh argued the cause for petitioners. With him on the briefs were *Juan D. Keller, Michael G. Biggers,* and *Brenda L. Talent.*

Don M. Downing, Deputy Attorney General of Missouri, argued the cause for respondents. With him on the brief for respondent Lohman were *Jeremiah W. (Jay) Nixon,* Attorney General, and *Gretchen Garrison* and *Jeffrey K. Elnicki*, Assistant Attorneys General. *George Alex Bartlett*, *Clifton S. Elgarten*, and *Stuart H. Newberger* filed a brief for respondents Delong's Incorporated et al.*

JUSTICE THOMAS delivered the opinion of the Court.

The State of Missouri imposes a uniform, statewide use tax on all goods purchased outside the State and stored, used, or consumed within the State. Although the tax is purportedly designed to "compensate" for sales taxes imposed by local jurisdictions on sales of goods in the State, local sales tax rates vary widely, and in many jurisdictions the use tax exceeds the sales tax. Petitioners contend that this system discriminates against interstate commerce in violation of the Commerce Clause, even though the local sales taxes across the State may, in the aggregate, place a greater burden on intrastate trade than the uniform use tax places on interstate trade. We agree that, in localities where the use tax exceeds the sales tax, the system is impermissibly discriminatory, and we therefore reverse the judgment of the Supreme Court of Missouri.

I

Missouri has a multitiered system of sales and use taxes. The State imposes by statute a tax of 4% on all sales of personal property in the State, Mo. Rev. Stat. § 144.020 (1986), and, through provisions in the State Constitution, provides for additional sales taxes of one-eighth of one percent and one-tenth of one percent on the same transactions. Mo. Const., Art. IV, §§ 43(a), 47(a). These levies are exactly paralleled by statutory and state constitutional provisions providing for use taxes of 4%, one-eighth of one percent, and one-tenth of one percent, respectively, on the "privilege of storing, using or consuming" within the State any article of personal property purchased outside the State. Mo. Rev. Stat. § 144.610(1) (1986); Mo. Const., Art. IV, §§ 43(a), 47(a).[1] Thus, under these various provisions, the State imposes a statewide sales tax of 4.225% on sales of goods within the State and a statewide use tax of 4.225% on goods brought into the State after being purchased elsewhere. These taxes are not challenged here.

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* *Daniel J. Popeo* and *Richard A. Samp* filed a brief for the Washington Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of St. Louis et al. by *Nancy Kelley Yendes;* for the Multistate Tax Commission by *Alan H. Friedman* and *Paull Mines;* and for the National Conference of State Legislatures et al. by *Richard Ruda* and *Lee Fennell.*

The State also imposes an "additional use tax" of 1.5% on the privilege of storing, using, or consuming within the State any article of personal property purchased outside the State. Mo. Rev. Stat. § 144.748 (Supp. 1993).[2] This use tax is not paired with any sales tax at the state level. The State, however, authorizes political subdivisions, including counties and incorporated municipalities, to impose a local sales tax.[3] Over 1,000 localities have used that authority to enact sales taxes ranging from 0.5% to 3.5%, while at least one county has no local sales tax at all.

Petitioner Associated Industries of Missouri is a trade association representing businesses that operate in Missouri and businesses that sell to customers in Missouri. Out-of-state members of the organization must collect the additional use tax on sales made into the State. Petitioner Alumax Foils, Inc., is a manufacturing firm in Missouri that pays the additional use tax on goods purchased from outside the State. Petitioners brought this action in state court contending that the use tax impermissibly discriminates against interstate commerce in violation of the Commerce Clause. The State Circuit Court rejected petitioners' claims and granted respondents' motion for summary judgment.

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[1] Although the use taxes literally apply to all products to be used, stored, or consumed in the State, § 144.615(2) provides an exemption for all goods subject to the Missouri sales tax—that is, goods purchased within the State—and the constitutional provisions incorporate by reference the same exemption. See Mo. Const., Art. IV, §§ 43(a), 47(a).

[2] Section 144.748(2) incorporates by reference the same exemption contained in § 144.615(2). See n. 1, *supra*. Because only the 1.5% additional use tax imposed by § 144.748, not the 4.225% use tax described above, is at issue in this case, references below to the "use tax" should be understood to refer to the 1.5% additional use tax.

[3] See, *e. g.*, Mo. Rev. Stat. §§ 66.600–66.630; 67.500–67.545; 92.400–92.420; 94.500–94.510; 94.600–94.655; 94.700–94.745 (1986 and Supp. 1993).

The Supreme Court of Missouri affirmed. 857 S. W. 2d 182 (1993). The court noted that the 1.5% use tax had been imposed to equalize taxes on in-state and out-of-state goods. Previously, political subdivisions of the State had imposed local sales tax burdens that were not paralleled by any use tax. Because the tax was designed to even exactions on intrastate and interstate trade, the court reasoned that the scheme should be analyzed under the "compensatory tax" doctrine, which the court summarized as permitting States to "impose . . . equivalent burden[s]" on transactions in local and interstate commerce. *Id.*, at 187.

The court acknowledged that, in 53.5% of local taxing jurisdictions, the 1.5% use tax exceeded the local sales tax. See *id.*, at 185, n. 3. But the court emphasized that 1990 sales figures from the stipulated record showed that over 93% of the dollar volume of sales in the State occurred in jurisdictions where the local sales tax exceeded the use tax. See *id.*, at 185. Calculating from similar figures, the court determined that, had a flat local sales tax of 1.5%—exactly equivalent to the use tax—been imposed in 1990, it would have *reduced* the sales tax burden on in-state sales by $100 million. *Ibid.* In short, the court concluded that given the high average rate of local sales taxes, the overall effect of the use tax scheme across the State was to place a lighter aggregate tax burden on interstate commerce than on intrastate commerce.

After rehearsing these facts, the court stated the issue before it as being whether "a state use tax may impose a greater burden than the various sales taxes in specific localities, if on a statewide basis the use tax imposes a lesser overall burden than do all the various sales taxes." *Id.*, at 186. Relying on this Court's decision in *General American Tank Car Corp.* v. *Day,* 270 U. S. 367 (1926), the court answered that question in the affirmative. The court reasoned that whether the tax scheme discriminated against interstate commerce should be determined on the basis of a comparison of the overall effects of the use tax and the local sales taxes on interstate commerce statewide. Because the figures outlined above suggested that, in the aggregate, the tax scheme imposed greater burdens on intrastate than on interstate commerce, the court concluded that the tax avoided discrimination on a statewide basis and thus did not violate the dictates of the Commerce Clause. 857 S. W. 2d, at 187–192.

In dissent, then-Chief Justice Robertson criticized the court's focus on averaging effects across the State to determine whether there was discrimination and suggested that the majority's method was tantamount to basing constitutional analysis on a conclusion that the use tax scheme was "'close enough for government work.'" *Id.*, at 195. Chief Justice Robertson concluded that this Court's cases contained a strict rule of equality that demanded equal treatment of local and interstate commerce in each local jurisdiction, not merely in the overall result for the State. *Id.*, at 199.

We granted certiorari, 510 U. S. 1009 (1993), to consider the validity of the 1.5% use tax.

II

Although the Commerce Clause is phrased merely as a grant of authority to Congress to "regulate Commerce . . . among the several States," Art. I, §8, cl. 3, it is well established that the Clause also embodies a negative command forbidding the States to discriminate against interstate trade. See, *e. g., Oregon Waste Systems, Inc.* v. *Department* *of Environmental Quality of Ore., ante,* at 98; *New Energy Co. of Ind.* v. *Limbach,* 486 U. S. 269, 273 (1988). The Clause prohibits economic protectionism—that is, "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.,* at 273–274. Thus, we have characterized the fundamental command of the Clause as being that "a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State," *Armco Inc.* v. *Hardesty,* 467 U. S. 638, 642 (1984), and have applied a "virtually *per se* rule of invalidity" to provisions that patently discriminate against interstate trade, *Philadelphia* v. *New Jersey,* 437 U. S. 617, 624 (1978).

A

By its terms, the additional use tax at issue in this case appears to violate the Commerce Clause's cardinal rule of nondiscrimination, for it exempts from its scope all sales of goods occurring within the State. See n. 2, *supra.* Nevertheless, our cases establish that such a levy may be saved from constitutional infirmity if it is a valid "compensatory tax" designed simply to make interstate commerce bear a burden already borne by intrastate commerce. Under the compensatory tax doctrine, a facially discriminatory tax that imposes on interstate commerce the equivalent of an "identifiable and substantially similar tax on intrastate commerce does not offend the negative Commerce Clause." *Oregon Waste, ante,* at 103 (internal quotation marks omitted). To ensure that the State is indeed merely imposing countervailing burdens on comparable transactions, we have required that the taxes on interstate and intrastate commerce be imposed on "substantially equivalent event[s]." *Maryland* v. *Louisiana,* 451 U. S. 725, 759 (1981). See also *Armco, supra,* at 643. The end result under the theory of the compensatory tax is that, "[w]hen the account is made up, the stranger from afar is subject to no greater burdens . . . than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 584 (1937).

To justify any levy as a compensatory tax, "a State must, as a threshold matter, 'identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate.'" *Oregon Waste, ante,* at 103 (quoting *Maryland, supra,* at 758). Respondents urge that the local sales taxes imposed by over a thousand political subdivisions within the State provide the burden on intrastate commerce that Missouri seeks to counterbalance through the use tax in this case. There is no dispute that sales taxes and use taxes such as those at issue here are imposed on "substantially equivalent event[s]." *Maryland, supra,* at 759. *Silas Mason* itself approved a system of sales and use taxes, and we have recognized that "[a] use tax is generally perceived as a necessary complement to [a] sales tax." *Williams* v. *Vermont,* 472 U. S. 14, 24 (1985). Cf. *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U. S. 64, 66 (1963) ("[T]he purpose of such a sales-use tax scheme is to make all tangible property used or consumed in the State subject to a uniform tax burden irrespective of whether it is acquired within the State . . . or from without the State").

Missouri's use tax scheme, however, runs afoul of the basic requirement that, for a tax system to be "compensatory," the burdens imposed on interstate and intrastate commerce must be equal. As we observed in *Maryland* v. *Louisiana,* the "common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." 451 U. S., at 759. See also *Halliburton, supra,* at 70 ("[E]qual treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state"). Where a State imposes equivalent sales and use taxes, we have upheld the system under the Commerce Clause. See *Silas Mason, supra,* at 584–587. But in Missouri, whether the 1.5% use tax is equal to (or lower than) the local sales tax is a matter of fortuity, depending entirely upon the locality in which the Missouri purchaser happens to reside. Where the use tax exceeds the sales tax, the discrepancy imposes a discriminatory burden on interstate commerce. Out-of-state goods brought into such a jurisdiction are subjected to a higher levy than are goods sold locally. The resulting disparity is incompatible with what we have termed the "strict rule of equality adopted in *Silas Mason.*" *Halliburton, supra,* at 73.

Respondents contend that the foregoing analysis is too myopic—that in reckoning the balance of accounts alluded to in *Silas Mason* we should focus, not on each political subdivision in which a disparity between the two taxes may result in discrimination against interstate commerce, but rather on the overall impact of the use tax and the various sales taxes on interstate commerce across the State as a whole. Respondents' theory assumes that discrimination in some parts of a state tax system may be permissible under the Commerce Clause as long as it is of a sufficiently limited magnitude to be offset by preferential treatment for interstate trade in other portions of the tax scheme. There is no question that, within a locality where the use tax exceeds the sales tax, the tax structure discriminates against interstate trade. Respondents merely argue that the local jurisdiction provides too narrow a framework for proper constitutional analysis.

We have never suggested, however, that patent discrimination in part of the operation of a tax scheme, not directly justified under any theory such as the compensatory tax doctrine, can be rendered inconsequential for Commerce Clause purposes by advantages given to interstate commerce in other facets of a tax plan or in other regions of a State. On the contrary, as a general matter we have rejected reliance on any calculus that requires a quantification of discrimination as a preliminary step to determining whether the discrimination is valid. Under our cases, unless one of several narrow bases of justification is shown, see *Oregon Waste, ante,* at 100–101, actual discrimination, wherever it is found, is impermissible, and the magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred. See *Wyoming* v. *Oklahoma,* 502 U. S. 437, 454–455 (1992); *New Energy Co.,* 486 U. S., at 276; *Maryland, supra,* at 760.

Moreover, two Terms ago we implicitly rejected any theory that would require aggregating the burdens on commerce across an entire State to determine the constitutionality of a burden on interstate trade imposed by a particular political subdivision of the State. We concluded that proper analysis of the practice of one county that discriminated against interstate trade was "unaffected by the fact that some other counties [in the State] ha[d] adopted a different policy." *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dept. of Natural Resources,* 504 U. S. 353, 363 (1992). Contrary to respondents' suggestions, our reasoning indicates that discrimination is appropriately assessed with reference to the specific subdivision in which applicable laws reveal differential treatment.

Any other approach would frustrate the Commerce Clause's central objective of securing a national "'area of free trade among the several States.'" *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U. S. 318, 328 (1977) (quoting *McLeod* v. *J. E. Dilworth Co.,* 322 U. S. 327, 330 (1944)). Under respondents' view, the Commerce Clause would interpose no bar to the systematic subdivision of the national market through discriminatory taxes as long as the taxes were imposed by counties, rather than by States—and provided, of course, that on balance each *State* as a whole did not discriminate against interstate trade. Such a rule "would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 356 (1951). We have never suggested that the Commerce Clause will tolerate such discrimination. Rather, "our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself." *Fort Gratiot, supra,* at 361.

Respondents contend that their proposed method of assessing discrimination on a statewide basis also finds support in our cases and, following the Supreme Court of Missouri, rely on our decision in *General American Tank Car Corp.* v. *Day,* 270 U. S. 367 (1926). *General American* involved a challenge to a Louisiana property tax scheme under which nondomiciliaries of the State were taxed at a rate of 25 mills on the dollar, while domiciliaries were taxed at a rate determined by their parish of domicile. See *id.,* at 370–371. Even though some parish tax rates were less than 25 mills on the dollar, the Court did not strike down the tax. The decision, however, does not provide controlling Commerce Clause analysis for this case.

Although *General American* involved both Commerce Clause and Equal Protection Clause challenges, it was only in analyzing the tax in question under the Equal Protection Clause that we engaged in the aggregating analysis respondents urge on us under the Commerce Clause today. Noting that, considered together, the parish taxes "average[d] approximately twenty-five mills," we concluded that "in substance" the scheme did not discriminate against nondomiciliaries and that it was not "invalid merely because equality in its operation as compared with local taxation has not been attained with mathematical exactness." *Id.,* at 373. We reasoned that, "[i]n determining whether there is a denial of equal protection of the laws by such taxation, we must look to the fairness and reasonableness of its purposes and practical operation, rather than to minute differences between its application in practice and the application of the taxing statute or statutes to which it is complementary." *Ibid.*

It might be argued that the assessment of equal treatment in *General American* was a final step in the Court's Commerce Clause analysis as well, for the discussion followed upon the conclusion that the Louisiana scheme survived Commerce Clause scrutiny "unless it operate[d] to discriminate in some substantial way between" domiciliaries and nondomiciliaries. *Id.*, at 372. But even if that were so, the *General American* approach to averaging burdens on interstate and intrastate commerce, which Chief Justice Robertson aptly characterized as a rule of "'close enough for government work,'" 857 S. W. 2d, at 195, never took root in our Commerce Clause jurisprudence. To the extent that *General American*'s Equal Protection Clause discussion ever could have been read as suggesting appropriate Commerce Clause analysis, it has been bypassed by later decisions, and particularly by the "strict rule of equality adopted in *Silas Mason*," *Halliburton*, 373 U. S., at 73, a rule that has controlled compensatory tax cases for over half a century. In *Silas Mason*, Justice Cardozo was explicit in explaining for the Court that the compensatory tax doctrine requires precision to ensure that, upon the "reckoning" of "account[s]," the "sum" on the interstate side of the ledger is "the same" as that on the intrastate side. 300 U. S., at 584. More recently, we have reiterated that strict parity is demanded by the compensatory tax doctrine as we have explained that a compensatory tax leaves a consumer free to make choices "without regard to the tax consequences"; if he purchases within the State he may pay a tax, but if he purchases from outside the State he will pay a "tax of the *same amount.*" *Boston Stock Exchange, supra,* at 332 (emphasis added).[4]

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[4] Of course, in focusing on equality, our cases have addressed the *limit* of permissible state regulation of interstate commerce. In setting the limit at equality, we have not suggested that lesser burdens on interstate trade are impermissible; that is, we have not demanded equality *and nothing but equality* in compensatory tax cases.

Respondents' final defense of the use tax is an appeal to Missouri's pure motives: that is, its lack of any intent to discriminate. As the product of a decentralized decisionmaking process that relies on the independent judgment of hundreds of local jurisdictions, the use tax scheme, in respondents' view, cannot reveal any overall design on the part of the State or any other governmental entity to disfavor interstate trade. In fact, respondents urge that holding this scheme unconstitutional would effectively eliminate the State's ability to delegate taxing authority to local jurisdictions. But a court need not inquire into the purpose or motivation behind a law to determine that in actuality it impermissibly discriminates against interstate commerce. See, *e. g., Philadelphia,* 437 U. S., at 626 (describing "legislative purpose" as "not . . . relevant to the constitutional issue to be decided"); *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333, 352–353 (1977). See also *Chemical Waste Management, Inc.* v. *Hunt,* 504 U. S. 334, 340–342 (1992).

It should be apparent that in holding this scheme unconstitutional we impose no new restrictions on the State's power to delegate its taxing authority as it sees fit. What a State may not do is appeal to decentralized decisionmaking to augment its powers: It may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance.

The State remains free to authorize political subdivisions to impose sales or use taxes, as long as discriminatory treatment of interstate commerce does not result. Other States apparently have had little difficulty in combining some local autonomy with the commands of the Commerce Clause. As the parties stipulated, App. 35, 28 States that provide political subdivisions some authority to impose use taxes have devised systems to ensure that use taxes are not higher than sales taxes within the same taxing jurisdiction. See, *e. g.,* Ga. Code Ann. § 48–8–110 (Supp. 1994) (requiring the enactment of a local use tax to be coupled with the adoption of an equivalent sales tax).

B

As our discussion above makes clear, Missouri's use tax scheme impermissibly discriminates against interstate commerce only in those localities where the local sales tax is less than 1.5%. Apparently hoping to obtain a refund for all moneys paid under the use tax, however, petitioners seek to have the tax struck down in its entirety. They urge us to hold that the tax is facially invalid in every jurisdiction because there is no countervailing statewide sales tax and no legislation ensuring that local sales taxes will always equal or exceed the use tax. The evil of the system, under this view, is not merely the actual discrimination that results in some localities, but the potential for discrimination in every locality. Indeed, the logic of petitioners' theory suggests that the potential for abuse would make Missouri's use tax scheme impermissibly discriminatory even if every political subdivision had chosen to impose a sales tax of greater than 1.5%.

But we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in "effect," see, *e. g., Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 270 (1984), and we have emphasized that "equality for the purposes of . . . the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U. S., at 70. See also *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 481 (1932) ("Discrimination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries"). A purely nominal distinction in a State's statutes between the methods of regulating intrastate and interstate commerce, as long as it is not translated into any difference in the substance of regulations imposed, cannot be said to provide "benefit[s]" to intrastate commerce or to impose discriminatory "burden[s]" on interstate trade. *New Energy*, 486 U. S., at 273. Thus, it would not violate the Commerce Clause.

For similar reasons, the mere fact that determining the compensatory character of the use tax in this case requires consideration of the sales taxes levied by hundreds of local jurisdictions does not mean that the use tax should be rejected *in toto* as facially discriminatory. A compensatory tax and the tax for which it compensates need not be promulgated in the same provision of state law, or even through the same governmental entity, to survive Commerce Clause scrutiny. Such matters of form do not determine in substance whether the tax merely requires interstate commerce to "pay its way," *Complete Auto Transit, Inc.* v. *Brady*, 430 U. S. 274, 281 (1977) (internal quotation marks omitted), or discriminates against interstate trade. "The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power." *Gregg Dyeing*, *supra*, at 480. See also *Maryland*, 451 U. S., at 756; *Halliburton*, *supra*, at 69.[5] If a State may place the provisions perfecting a compensatory tax scheme in two or more statutes passed by the state legislature, there is no logical reason to think that a State's decision to implement its sales/use tax scheme through provisions promulgated at different levels of government within the State makes the system invalid.

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[5] Of course, this is not to suggest that courts should "plunge . . . into the morass of weighing comparative tax burdens," *American Trucking Assns., Inc.* v. *Scheiner*, 483 U. S. 266, 289 (1987) (internal quotation marks omitted). But as far as the compensatory tax doctrine is concerned, a court that is confined to examining the rates specified in statutes, ordinances, or regulations for taxes assessed on "substantially equivalent event[s]," *Maryland* v. *Louisiana*, 451 U. S. 725, 759 (1981)—even if the

C

That we have declared the tax scheme impermissibly discriminatory in some localities does not in itself dictate the relief that the State must provide. As we noted in *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U. S. 18, 39–40 (1990), a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." We have suggested that the provision of a "meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing" is itself sufficient to satisfy constitutional concerns. *Id.*, at 38, n. 21. Because the parties have not addressed the procedures that were available in Missouri to contest the tax, any effect Missouri's procedures might have on the appropriate remedy in this case is best left for consideration on remand. Even if no such predeprivation procedure existed, the Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." *Id.*, at 44, n. 27. The methods best adapted to achieving equal treatment in this case, whether partial or complete refunds or other measures, are similarly matters properly left for determination on remand.

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inquiry requires examination of hundreds of provisions for political units within the State—avoids being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system.

III

For the foregoing reasons, the judgment of the Supreme Court of Missouri is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN concurs in the judgment.

MORGAN STANLEY & CO., INC., ET AL. *v.* PACIFIC MUTUAL LIFE INSURANCE CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 93–609. Argued April 26, 1994—Decided May 23, 1994

997 F. 2d 39, affirmed by an equally divided Court.

James W. B. Benkard argued the cause for petitioners. With him on the briefs were *James D. Liss, Vincent T. Chang, Hannah Berkowitz, James L. Truitt, Robert B. Mazur, Ernest E. Figari, Jr., Theodore Edelman, Fletcher L. Yarbrough, Robert G. Cohen, Kathryn A. Oberly,* and *Morton L. Susman.*

Richard G. Taranto argued the cause for respondent Pacific Mutual Life Ins. Co. With him on the brief were *H. Bartow Farr III* and *Stewart M. Weltman. Michael R. Dreeben* argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Deputy Solicitor General Kneedler, Barbara C. Biddle, Paul Gonson,* and *Jacob H. Stillman.**

PER CURIAM.

The judgment of the United States Court of Appeals for the Fifth Circuit is affirmed by an equally divided Court.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

**James M. Finberg* and *Paul J. Mishkin* filed a brief for the National Association of Securities and Commercial Law Attorneys as *amicus curiae* urging affirmance.

Barbara B. Edelman and *Barry Friedman* filed a brief for Spendthrift Farm, Inc., et al. as *amici curiae.*

McKNIGHT *v.* GENERAL MOTORS CORP.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92–1113. Decided May 23, 1994

When the Court of Appeals dismissed petitioner's appeal of the dismissal of his employment discrimination claim, it also imposed sanctions, finding that the appeal was frivolous in light of controlling Circuit precedent holding that § 101 of the Civil Rights Act of 1991 does not apply to cases arising before its enactment.

Held: If sanctions were imposed solely because the retroactivity argument was foreclosed by Circuit precedent, the sanctions order was improper. While the Court of Appeals correctly rejected petitioner's argument that § 101 applies retroactively, see, *e. g., Landgraf* v. *USI Film Products, ante,* p. 244, at the time of his appeal, this Court had not yet ruled on the question. Filing an appeal was the only way he could preserve the issue pending a possible favorable decision by this Court. The retroactivity question had divided the District Courts, and its answer was not so clear as to make his position frivolous.

Certiorari granted; vacated and remanded.

PER CURIAM.

After petitioner appealed the dismissal of his employment discrimination claim, respondent moved for dismissal of the appeal and for sanctions. Respondent argued that the appeal was frivolous in light of controlling decisions of the Court of Appeals for the Seventh Circuit holding that § 101 of the Civil Rights Act of 1991, 105 Stat. 1071, 42 U. S. C. § 1981 (1988 ed., Supp. IV), does not apply to cases arising before its enactment. See *Luddington* v. *Indiana Bell Tel. Co.,* 966 F. 2d 225 (1992); *Mozee* v. *American Commercial Marine Serv. Co.,* 963 F. 2d 929 (1992). In an order dated September 30, 1992, the Court of Appeals granted respondent's motion, dismissed the appeal, and imposed a $500 sanction on petitioner's attorney.

The Court of Appeals correctly rejected petitioner's argument that § 101 applies retroactively. See *Landgraf* v. *USI*

Film Products, ante, p. 244; *Rivers* v. *Roadway Express, Inc., ante,* p. 298. However, if the only basis for the order imposing sanctions on petitioner's attorney was that his retroactivity argument was foreclosed by Circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court had not yet ruled on the application of § 101 to pending cases. Filing an appeal was the only way petitioner could preserve the issue pending a possible favorable decision by this Court. Although, as of September 30, 1992, there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner's position frivolous. See *Mozee, supra,* at 940–941 (Cudahy, J., dissenting).

Accordingly, the petition for a writ of certiorari is granted, the order imposing sanctions is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

WATERS ET AL. *v.* CHURCHILL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92–1450. Argued December 1, 1993—Decided May 31, 1994

Petitioners fired respondent Churchill from her nursing job at a public hospital, allegedly because of statements she made to co-worker Perkins-Graham during a work break. What Churchill actually said during the conversation is in dispute. Petitioners' version was based on interviews with Perkins-Graham and one Ballew, who had overheard part of the conversation, and indicated that Churchill made disruptive statements critical of her department and of petitioners. However, in Churchill's version, which was corroborated by others who had overheard part of the conversation, her speech was largely limited to nondisruptive statements critical of the hospital's "cross-training" policy, which she believed threatened patient care. Churchill sued under 42 U. S. C. § 1983, claiming that her speech was protected under *Connick* v. *Myers,* 461 U. S. 138, 142, in which the Court held that the First Amendment protects a government employee's speech if it is on a matter of public concern and the employee's interest in expressing herself on this matter is not outweighed by any injury the speech could cause to the government's interest, as an employer, in promoting the efficiency of the public services it performs through its employees. The District Court granted petitioners summary judgment, holding that management could fire Churchill with impunity because neither version of the conversation was protected under *Connick.* The Court of Appeals reversed, concluding that Churchill's speech, viewed in the light most favorable to her, was on a matter of public concern and was not disruptive, and that the inquiry must turn on what her speech actually was, as determined by a jury, not on what the employer thought it was.

Held: The judgment is vacated, and the case is remanded.

977 F. 2d 1114, vacated and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE SOUTER, AND JUSTICE GINSBURG, concluded:

1. The *Connick* test should be applied to what the government employer reasonably thought was said, not to what the trier of fact ultimately determines to have been said. Pp. 668–679.

(a) Absent a general test for deciding when the First Amendment requires a procedural safeguard, the question must be answered on a case-by-case basis, by considering the procedure's cost and the relative magnitude and constitutional significance of the risks of erroneous punishment of protected speech and of erroneous exculpation of unprotected speech that the procedure involves. In evaluating these factors here, the key is the government employer's interest in achieving its goals as effectively and efficiently as possible. Pp. 668–675.

(b) The Court of Appeals' approach gives insufficient weight to this interest, since it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court, whereas employment decisions are frequently and properly based on hearsay, past similar conduct, personal knowledge of people's credibility, and other factors that the judicial process ignores. Pp. 675–677.

(c) On the other hand, courts must not apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith alone is sufficient under the First Amendment. *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274, and *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.,* 391 U. S. 563, distinguished. P. 677.

(d) Thus, if an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the First Amendment requires that the manager proceed with the care that a reasonable manager would use before making an employment decision of the sort involved in the particular case. In situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion, many different courses of action will necessarily be reasonable, and only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable. Pp. 677–678.

2. Applying the foregoing to this case demonstrates that petitioners must win if they really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it. That belief, based on the investigation petitioners conducted, would have been entirely reasonable. Moreover, as a matter of law, the potential disruptiveness of Churchill's speech would have rendered it unprotected under the *Connick* test. Nonetheless, the District Court erred in granting petitioners summary judgment, since Churchill has produced enough evidence to create a material issue of disputed fact about whether she was actually fired because of disruptive statements, or because of nondisruptive state-

ments about cross-training, or because of other statements she may have made earlier. If either of the latter is so, the court will have to determine whether the statements in question were protected speech. Pp. 679–682.

JUSTICE SCALIA, joined by JUSTICE KENNEDY and JUSTICE THOMAS, concluded that the Court should adhere to its previously stated rule that a public employer's disciplining of an employee violates the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern, see, *e. g., Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 572, and should not add to this prohibition a requirement that the employer conduct an investigation before taking disciplinary action. The plurality's recognition of a broad new First Amendment right to an investigation before dismissal for speech is unprecedented and unpredictable in its application and consequences. In light of the requirement of a pretext inquiry, it is also superfluous to the disposition of this case and unnecessary for the protection of public-employee speech on matters of public concern. Judicial inquiry into the genuineness of a public employer's asserted permissible justification for an employment decision—be it unprotected speech, general insubordination, or laziness—is all that is necessary to avoid the targeting of "public interest" speech condemned in *Pickering.* See, *e. g., Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287. Churchill's right not to be dismissed in retaliation for her expression of views on a matter of public concern was not violated, since she was dismissed for another reason, erroneous though it may have been. Pp. 686–694.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SOUTER and GINSBURG, JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 682. SCALIA, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 686. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 694.

Lawrence A. Manson argued the cause for petitioners. With him on the briefs was *Donald J. McNeil.*

Richard H. Seamon argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days, Assistant Attorney General Hunger, Acting Deputy Solicitor General Kneedler, Barbara L. Herwig,* and *Robert D. Kamenshine.*

John H. Bisbee argued the cause for respondents. With him on the brief was *Barry Nakell.**

JUSTICE O'CONNOR announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE SOUTER, and JUSTICE GINSBURG join.

In *Connick* v. *Myers*, 461 U. S. 138 (1983), we set forth a test for determining whether speech by a government employee may, consistently with the First Amendment, serve as a basis for disciplining or discharging that employee. In this case, we decide whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said.

I

This case arises out of a conversation that respondent Cheryl Churchill had on January 16, 1987, with Melanie Perkins-Graham. Both Churchill and Perkins-Graham were nurses working at McDonough District Hospital; Churchill was in the obstetrics department, and Perkins-Graham was considering transferring to that department. The conversation took place at work during a dinner break. Petitioners heard about it and fired Churchill, allegedly because of it. There is, however, a dispute about what Churchill actually said, and therefore about whether petitioners were constitutionally permitted to fire Churchill for her statements.

**Richard Ruda* and *Glen D. Nager* filed a brief for the International City/County Management Association et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Nurses Association by *Ronald C. Jessamy;* for the National Education Association et al. by *Robert H. Chanin, Jeremiah A. Collins,* and *Larry P. Weinberg;* and for the Southern States Police Benevolent Association et al. by *J. Michael McGuinness.*

Charles E. Tucker, Jr., Patricia C. Benassi, and *Mary Lee Leahy* filed a brief for the National Employment Lawyers Association as *amicus curiae.*

The conversation was overheard in part by two other nurses, Mary Lou Ballew and Jean Welty, and by Dr. Thomas Koch, the clinical head of obstetrics. A few days later, Ballew told Cynthia Waters, Churchill's supervisor, about the incident. According to Ballew, Churchill took "'the cross trainee into the kitchen for . . . at least 20 minutes to talk about [Waters] and how bad things are in [obstetrics] in general.'" 977 F. 2d 1114, 1118 (CA7 1992). Ballew said that Churchill's statements led Perkins-Graham to no longer be interested in switching to the department. Supplemental App. of Defendants-Appellees in No. 91–2288 (CA7), p. 60.

Shortly after this, Waters met with Ballew a second time for confirmation of Ballew's initial report. Ballew said that Churchill "was knocking the department" and that "in general [Churchill] was saying what a bad place [obstetrics] is to work." Ballew said she heard Churchill say Waters "was trying to find reasons to fire her." Ballew also said Churchill described a patient complaint for which Waters had supposedly wrongly blamed Churchill. *Id.*, at 67–68.

Waters, together with petitioner Kathleen Davis, the hospital's vice president of nursing, also met with Perkins-Graham, who told them that Churchill "had indeed said unkind and inappropriate negative things about [Waters]." *Id.*, at 228. Also, according to Perkins-Graham, Churchill mentioned a negative evaluation that Waters had given Churchill, which arose out of an incident in which Waters had cited Churchill for an insubordinate remark. *Ibid.* The evaluation stated that Churchill "'promotes an unpleasant atmosphere and hinders constructive communication and cooperation,'" 977 F. 2d, at 1118, and "'exhibits negative behavior towards [Waters] and [Waters'] leadership through her actions and body language'"; the evaluation said Churchill's work was otherwise satisfactory, *id.*, at 1116. Churchill allegedly told Perkins-Graham that she and Waters had discussed the evaluation, and that Waters "wanted to wipe the slate clean . . . but [Churchill thought] this wasn't possible."

Supplemental App. of Defendants-Appellees in No. 91–2288, at 228. Churchill also allegedly told Perkins-Graham "that just in general things were not good in OB and hospital administration was responsible." *Id.*, at 229. Churchill specifically mentioned Davis, saying Davis "was ruining MDH." *Ibid.* Perkins-Graham told Waters that she knew Davis and Waters "could not tolerate that kind of negativism." *Ibid.*

Churchill's version of the conversation is different. For several months, Churchill had been concerned about the hospital's "cross-training" policy, under which nurses from one department could work in another when their usual location was overstaffed. Churchill believed this policy threatened patient care because it was designed not to train nurses but to cover staff shortages, and she had complained about this to Davis and Waters. According to Churchill, the conversation with Perkins-Graham primarily concerned the cross-training policy. 977 F. 2d, at 1118. Churchill denies that she said some of what Ballew and Perkins-Graham allege she said. She does admit she criticized Davis, saying her staffing policies threatened to "ruin" the hospital because they "'seemed to be impeding nursing care.'" *Ibid.* She claims she actually defended Waters and encouraged Perkins-Graham to transfer to obstetrics. *Ibid.*

Koch's and Welty's recollections of the conversation match Churchill's. *Id.*, at 1122. Davis and Waters, however, never talked to Koch or Welty about this, and they did not talk to Churchill until the time they told her she was fired. Moreover, Churchill claims, Ballew was biased against Churchill because of an incident in which Ballew apparently made an error and Churchill had to cover for her. Brief for Respondents 9, n. 12.

After she was discharged, Churchill filed an internal grievance. The president of the hospital, petitioner Stephen Hopper, met with Churchill in regard to this and heard her side of the story. App. to Pet. for Cert. 75–77. He then reviewed Waters' and Davis' written reports of their conversations with Ballew and Perkins-Graham, and had Bernice Magin, the hospital's vice president of human resources, interview Ballew one more time. Supplemental App. of Defendants-Appellees in No. 91–2288, at 108, 139–142. After considering all this, Hopper rejected Churchill's grievance.

Churchill then sued under Rev. Stat. § 1979, 42 U. S. C. § 1983, claiming that the firing violated her First Amendment rights because her speech was protected under *Connick* v. *Myers*, 461 U. S. 138 (1983). In May 1991, the United States District Court for the Central District of Illinois granted summary judgment to petitioners. The court held that neither version of the conversation was protected under *Connick:* Regardless of whose story was accepted, the speech was not on a matter of public concern, and even if it was on a matter of public concern, its potential for disruption nonetheless stripped it of First Amendment protection. Therefore, the court held, management could fire Churchill for the conversation with impunity. App. to Pet. for Cert. 45–49.

The United States Court of Appeals for the Seventh Circuit reversed. 977 F. 2d 1114 (1992). The court held that Churchill's speech, viewed in the light most favorable to her, was protected speech under the *Connick* test: It was on a matter of public concern—"the hospital's [alleged] violation of state nursing regulations as well as the quality and level of nursing care it provides its patients," *id.*, at 1122—and it was not disruptive, *id.*, at 1124.

The court also concluded that the inquiry must turn on what the speech actually was, not on what the employer thought it was. "If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigation into the employee's conduct," the court held, "the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental." *Id.*, at 1127 (footnote omitted).

We granted certiorari, 509 U. S. 903 (1993), to resolve a conflict among the Circuits on this issue. Compare the decision below with *Atcherson* v. *Siebenmann*, 605 F. 2d 1058 (CA8 1979); *Wulf* v. *Wichita*, 883 F. 2d 842 (CA10 1989); *Sims* v. *Metropolitan Dade County*, 972 F. 2d 1230 (CA11 1992).

II

A

There is no dispute in this case about when speech by a government employee is protected by the First Amendment: To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick, supra,* at 142 (quoting *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 568 (1968)). It is also agreed that it is the court's task to apply the *Connick* test to the facts. 461 U. S., at 148, n. 7, and 150, n. 10.

The dispute is over how the factual basis for applying the test—what the speech was, in what tone it was delivered, what the listener's reactions were, see *id.*, at 151–153—is to be determined. Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself? The Court of Appeals held that the employer's factual conclusions were irrelevant, and that the jury should engage in its own factfinding. Petitioners argue that the employer's factual conclusions should be dispositive. Respondents take a middle course: They suggest that the court should accept the employer's factual conclusions, but only if those conclusions were arrived at reasonably, see Brief for Respondents 39, something they say did not happen here.

We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures—a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on—to be constitutionally required in proceedings that may penalize protected speech. See *Freedman* v. *Maryland,* 380 U. S. 51, 58–60 (1965) (government must bear burden of proving that speech is unprotected); *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958) (same); *Philadelphia Newspapers, Inc.* v. *Hepps,* 475 U. S. 767, 775–778 (1986) (libel plaintiff must bear burden of proving that speech is false); *Masson* v. *New Yorker Magazine, Inc.,* 501 U. S. 496, 510 (1991) (actual malice must be proved by clear and convincing evidence); *Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U. S. 485, 503–511 (1984) (appellate court must make independent judgment about presence of actual malice).

These cases establish a basic First Amendment principle: Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected. And though JUSTICE SCALIA suggests that this principle be limited to licensing schemes and to "deprivation[s] of the freedom of speech specifically *through the judicial process,*" *post,* at 687 (emphasis in original), we do not think the logic of the cases supports such a limitation. Speech can be chilled and punished by administrative action as much as by judicial processes; in no case have we asserted or even implied the contrary. In fact, in *Speiser* v. *Randall,* we struck down procedures, on the grounds that they were insufficiently protective of free speech, which involved both administrative and judicial components. *Speiser,* like this case, dealt with a government decision to deny a speaker certain benefits—in *Speiser* a tax exemption, in this case a government job—based on what the speaker said. Our holding there did not depend on the deprivation taking place "specifically through the judicial process," and we cannot see how the result could have been any different had the process been entirely administrative, with no judicial review. We cannot sweep aside *Speiser* and the other cases cited above as easily as JUSTICE SCALIA proposes.

Nonetheless, not every procedure that may safeguard protected speech is constitutionally mandated. True, the procedure adopted by the Court of Appeals may lower the chance of protected speech being erroneously punished. A speaker is more protected if she has two opportunities to be vindicated—first by the employer's investigation and then by the jury—than just one. But each procedure involves a different mix of administrative burden, risk of erroneous punishment of protected speech, and risk of erroneous exculpation of unprotected speech. Though the First Amendment creates a strong presumption against punishing protected speech even inadvertently, the balance need not always be struck in that direction. We have never, for instance, required proof beyond a reasonable doubt in civil cases where First Amendment interests are at stake, though such a requirement would protect speech more than the alternative standards would. Compare, *e. g., California ex rel. Cooper* v. *Mitchell Brothers' Santa Ana Theater,* 454 U. S. 90, 93 (1981) *(per curiam),* with *McKinney* v. *Alabama,* 424 U. S. 669, 686 (1976) (Brennan, J., concurring in judgment in part). Likewise, the possibility that defamation liability would chill even true speech has not led us to require an actual malice standard in all libel cases. *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.,* 472 U. S. 749, 761 (1985) (plurality opinion); *Gertz* v. *Robert Welch, Inc.,* 418 U. S. 323 (1974). Nor has the possibility that overbroad regulations may chill commercial speech convinced us to extend the overbreadth doctrine into the commercial speech area. *Bates* v. *State Bar of Ariz.,* 433 U. S. 350, 380–381 (1977).

We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment—just as we have never set forth a general test to determine what constitutes a compelling state interest, see *Boos* v. *Barry*, 485 U. S. 312, 324 (1988), or what categories of speech are so lacking in value that they fall outside the protection of the First Amendment, *New York* v. *Ferber*, 458 U. S. 747, 763–764 (1982), or many other matters—and we do not purport to do so now. But though we agree with JUSTICE SCALIA that the lack of such a test is inconvenient, see *post*, at 687–688, this does not relieve us of our responsibility to decide the case that is before us today. Both JUSTICE SCALIA and we agree that some procedural requirements are mandated by the First Amendment and some are not. See *post*, at 686. None of us have discovered a general principle to determine where the line is to be drawn. See *post*, at 686–688. We must therefore reconcile ourselves to answering the question on a case-by-case basis, at least until some workable general rule emerges.

Accordingly, all we say today is that the propriety of a proposed procedure must turn on the particular context in which the question arises—on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase. And to evaluate these factors here we have to return to the issue we dealt with in *Connick* and in the cases that came before it: What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?

B

We have never explicitly answered this question, though we have always assumed that its premise is correct—that the government as employer indeed has far broader powers than does the government as sovereign. See, *e. g., Pickering*, 391 U. S., at 568; *Civil Service Comm'n* v. *Letter Carri-*

ers, 413 U. S. 548, 564 (1973); *Connick,* 461 U. S., at 147. This assumption is amply borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech.

To begin with, even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of . . . the process of open debate," *Cohen* v. *California,* 403 U. S. 15, 24–25 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work. "Under the First Amendment there is no such thing as a false idea," *Gertz, supra,* at 339; the "fitting remedy for evil counsels is good ones," *Whitney* v. *California,* 274 U. S. 357, 375 (1927) (Brandeis, J., concurring). But when an employee counsels her co-workers to do their job in a way with which the public employer disagrees, her managers may tell her to stop, rather than relying on counterspeech. The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270 (1964). But though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. Cf. *Branti* v. *Finkel,* 445 U. S. 507, 518 (1980). Even something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees. *Broadrick* v. *Oklahoma,* 413 U. S. 601 (1973); *Letter Carriers, supra; Public Workers* v. *Mitchell,* 330 U. S. 75 (1947).

Government employee speech must be treated differently with regard to procedural requirements as well. For example, speech restrictions must generally precisely define the speech they target. *Baggett* v. *Bullitt*, 377 U. S. 360, 367–368 (1964); *Hustler Magazine, Inc.* v. *Falwell*, 485 U. S. 46, 55 (1988). Yet surely a public employer may, consistently with the First Amendment, prohibit its employees from being "rude to customers," a standard almost certainly too vague when applied to the public at large. Cf. *Arnett* v. *Kennedy*, 416 U. S. 134, 158–162 (1974) (plurality opinion) (upholding a regulation that allowed discharges for speech that hindered the "efficiency of the service"); *id.*, at 164 (Powell, J., concurring in part and concurring in result in part) (agreeing on this point).

Likewise, we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, see *Public Workers* v. *Mitchell*, *supra*, at 99; or that high officials should allow more public dissent by their subordinates, see *Connick*, *supra*, at 168–169 (Brennan, J., dissenting); Whistleblower Protection Act of 1989, 103 Stat. 16, or that even in a government workplace the free market of ideas is superior to a command economy. But we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. Compare, *e. g.*, *Connick*, *supra*, at 151–152; *Letter Carriers*, *supra*, at 566–567, with *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 129 (1989); *Texas* v. *Johnson*, 491 U. S. 397, 409 (1989). Similarly, we have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern. Doubtless some such speech is sometimes nondisruptive; doubtless it is sometimes of value to the speakers and the listeners. But we have declined to question government employers' decisions on such matters. *Connick, supra,* at 146–149.

This does not, of course, show that the First Amendment should play no role in government employment decisions. Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. *Pickering, supra,* at 572. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. See, *e. g., Rankin* v. *McPherson,* 483 U. S. 378, 388 (1987); *Connick, supra,* at 152; *Pickering, supra,* at 569–571. Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. See, *e. g.,* Whistleblower Protection Act of 1989, *supra.*

But the above examples do show that constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign. The restrictions discussed above are allowed not just because the speech interferes with the government's operation. Speech by private people can do the same, but this does not allow the government to suppress it.

Rather, the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. The reason the governor may, in the example given above, fire the deputy is not that this dismissal would somehow be narrowly tailored to a compelling government interest. It is that the governor and the governor's staff have a job to do, and the governor justifiably feels that a quieter subordinate would allow them to do this job more effectively.

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

C

1

The Court of Appeals' decision, we believe, gives insufficient weight to the government's interest in efficient employment decisionmaking. In other First Amendment contexts the need to safeguard possibly protected speech may indeed outweigh the government's efficiency interests. See, *e. g., Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Speiser* v. *Randall,* 357 U. S., at 526. But where the government is acting as employer, its efficiency concerns should, as we discussed above, be assigned a greater value.

The problem with the Court of Appeals' approach—under which the facts to which the *Connick* test is applied are determined by the judicial factfinder—is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court. The government manager would have to ask not what conclusions she, as an experienced professional, can draw from the circumstances, but rather what conclusions a jury would later draw. If she relies on hearsay, or on what she knows about the accused employee's character, she must be aware that this evidence might not be usable in court. If she knows one party is, in her personal experience, more credible than another, she must realize that the jury will not share that personal experience. If she thinks the alleged offense is so egregious that it is proper to discipline the accused employee even though the evidence is ambiguous, she must consider that a jury might decide the other way.

But employers, public and private, often do rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores. Such reliance may sometimes be the most effective way for the employer to avoid future recurrences of improper and disruptive conduct. What works best in a judicial proceeding may not be appropriate in the employment context. If one employee accuses another of misconduct, it is reasonable for a government manager to credit the allegation more if it is consistent with what the manager knows of the character of the accused. Likewise, a manager may legitimately want to discipline an employee based on complaints by patrons that the employee has been rude, even though these complaints are hearsay.

It is true that these practices involve some risk of erroneously punishing protected speech. The government may certainly choose to adopt other practices, by law or by contract. But we do not believe that the First Amendment requires it to do so. Government employers should be allowed to use personnel procedures that differ from the evidentiary rules used by courts, without fear that these differences will lead to liability.

2

On the other hand, we do not believe that the court must apply the *Connick* test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete. Cf. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 342–343 (1985); *United States* v. *Leon*, 468 U. S. 897, 914 (1984); *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 490–491 (1951). It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does not follow that good faith is sufficient. JUSTICE SCALIA is right in saying that we have often held various laws to require only an inquiry into the decisionmaker's intent, see *post*, at 690–691, but, as discussed *supra* in Part II–A, this has not been our view of the First Amendment.

We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be. It may be unreasonable, for example, for the employer to come to a conclusion based on no evidence at all. Likewise, it may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.

If an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected, the manager must tread with a certain amount of care. This need not be the care with which trials, with their rules of evidence and procedure, are conducted. It should, however, be the care that a reasonable manager would use before making an employment decision—discharge, suspension, reprimand, or whatever else—of the sort involved in the particular case. JUSTICE SCALIA correctly points out that such care is normally not constitutionally required unless the employee has a protected property interest in her job, *post*, at 688; see also *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 576–578 (1972); but we believe that the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary.

Of course, there will often be situations in which reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion. In those situations, many different courses of action will necessarily be reasonable. Only procedures outside the range of what a reasonable manager would use may be condemned as unreasonable.

Petitioners argue that *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977), forecloses a reasonableness test, and holds instead that the First Amendment was not violated unless "'the defendant[s'] *intent* [was] to violate the plaintiff['s] constitutional rights.'" Brief for Petitioners 25; see also *post*, at 690 (SCALIA, J., dissenting). JUSTICE SCALIA makes a similar argument based on *Pickering*, *Connick*, and *Perry*, which alluded to the impropriety of management "retaliation" for protected speech. *Post*, at 689. But in all those cases the employer assertedly knew the true content of the employee's protected speech, and fired the employee in part because of it. In none of them did we have occasion to decide what should happen if the defendants hold an erroneous and unreasonable belief about what plaintiff said. These cases cannot be read as foreclosing an argument that they never dealt with. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 38 (1952).

3

We disagree with JUSTICE STEVENS' contention that the test we adopt "provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights." *Post,* at 695. We have never held that it is a violation of the Constitution for a government employer to discharge an employee based on substantively incorrect information. Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure. And an at-will government employee—such as Churchill apparently was, App. to Pet. for Cert. 70—generally has no claim based on the Constitution at all.

Of course, an employee may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law, or under some state statute or common-law cause of action. In some situations, the employee may even have a federal statutory claim. See *NLRB* v. *Burnup & Sims, Inc.,* 379 U. S. 21 (1964). Likewise, the State or Federal Governments may, if they choose, provide similar protection to people fired because of their speech. But this protection is not mandated by the Constitution.

The one pattern from which our approach does diverge is the broader protection normally given to people in their relationship with the government as sovereign. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S., at 279–280, cited *post,* at 696, 699 (STEVENS, J., dissenting). But the reasons for this are those discussed *supra* in Part II–B: "[O]ur 'profound national commitment' to the freedom of speech," *post,* at 699 (STEVENS, J., dissenting), must of necessity operate differently when the government acts as employer rather than sovereign.

III

Applying the foregoing to this case, it is clear that if petitioners really did believe Perkins-Graham's and Ballew's story, and fired Churchill because of it, they must win. Their belief, based on the investigation they conducted, would have been entirely reasonable. After getting the initial report from Ballew, who overheard the conversation, Waters and Davis approached and interviewed Perkins-Graham, and then interviewed Ballew again for confirmation. In response to Churchill's grievance, Hopper met directly with Churchill to hear her side of the story, and instructed Magin to interview Ballew one more time. Management can spend only so much of their time on any one employment decision. By the end of the termination process, Hopper, who made the final decision, had the word of two trusted employees, the endorsement of those employees' reliability by three hospital managers, and the benefit of a face-to-face meeting with the employee he fired. With that in hand, a reasonable manager could have concluded that no further time needed to be taken. As respondents themselves point out, "if the belief an employer forms supporting its adverse personnel action is 'reasonable,' an employer has no need to investigate further." Brief for Respondents 39.

And under the *Connick* test, Churchill's speech as reported by Perkins-Graham and Ballew was unprotected. Even if Churchill's criticism of cross-training reported by Perkins-Graham and Ballew was speech on a matter of public concern—something we need not decide—the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had. According to Ballew, Churchill's speech may have substantially dampened Perkins-Graham's interest in working in obstetrics. Discouraging people from coming to work for a department certainly qualifies as disruption. Moreover, Perkins-Graham perceived Churchill's statements about Waters to be "unkind and inappropriate," and told management that she knew they could not continue to "tolerate that kind of negativism" from Churchill. This is strong evidence that Churchill's complaining, if not dealt with, threatened to undermine management's authority in Perkins-Graham's eyes. And finally, Churchill's statement, as reported by Perkins-Graham, that it "wasn't possible" to "wipe the slate clean" between her and Waters could certainly make management doubt Churchill's future effectiveness. As a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had.

This is so even if, as Churchill suggests, Davis and Waters were "[d]eliberately [i]ndifferent," Brief for Respondents 31, to the possibility that much of the rest of the conversation was solely about cross-training. So long as Davis and Waters discharged Churchill only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, it is irrelevant whether the rest of the speech was, unbeknownst to them, both on a matter of public concern and nondisruptive. The *Connick* test is to be applied to the speech for which Churchill was fired. Cf. *Connick*, 461 U. S., at 149 (evaluating the disruptiveness of part of plaintiff's speech because that part was "upon a matter of public concern *and contributed to [plaintiff's] discharge*" (emphasis added)); *Mt. Healthy*, 429 U. S., at 286–287. An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements.

Nonetheless, we agree with the Court of Appeals that the District Court erred in granting summary judgment in petitioners' favor. Though Davis and Waters would have been justified in firing Churchill for the statements outlined above, there remains the question whether Churchill was actually fired because of those statements, or because of something else. See *Mt. Healthy*, *supra*, at 286–287.

Churchill has produced enough evidence to create a material issue of disputed fact about petitioners' actual motivation. Churchill had criticized the cross-training policy in the past; management had exhibited some sensitivity about the criticisms; Churchill pointed to some other conduct by hospital management that, if viewed in the light most favorable to her, would show that they were hostile to her because of her criticisms. 977 F. 2d, at 1125–1126. A reasonable factfinder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier. If this is so, then the court will have to determine whether those statements were protected speech, a different matter than the one before us now.

Because of our conclusion, we need not determine whether the defendants were entitled to qualified immunity. We also need not decide whether the defendants were acting pursuant to hospital policy or custom, because that question, though argued by petitioners in their merits brief, was not presented in the petition for certiorari. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. 27 (1993) *(per curiam)*. Rather, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

JUSTICE SOUTER, concurring.

I

I join JUSTICE O'CONNOR's plurality opinion stating that, under the Free Speech Clause, a public employer who reasonably believes a third-party report that an employee engaged in constitutionally unprotected speech may punish the employee in reliance on that report, even if it turns out that the employee's actual remarks were constitutionally protected. I add these words to emphasize that, in order to avoid liability, the public employer must not only reasonably investigate the third-party report, but must also actually believe it. Under the plurality's opinion, an objectively reasonable investigation that fails to convince the employer that the employee actually engaged in disruptive or otherwise unprotected speech does not inoculate the employer against constitutional liability. A public employer violates the Free Speech Clause, that is, by invoking a third-party report to penalize an employee when the employer, despite the report and the reasonable investigation into it, believes or genuinely suspects that the employee's speech was protected in its entirety or in that part on which the employer purports to rely in taking disciplinary action; or if the employer invokes the third-party report merely as a pretext to shield disciplinary action taken because of protected speech the employer believes or genuinely suspects that the employee uttered at another time.

First Amendment limitations on public employers, as the plurality explains, must reflect a balance of the public employer's interest in accomplishing its mission and the public employee's interest in speaking on matters of public concern. See *ante*, at 668–675. Where an employer penalizes an employee on the basis of a third-party report of speech that the employer should have suspected, based on the content of the report and the employer's familiarity with the employee and the workplace, to have been constitutionally protected, this balance must reflect the facts that employees' speech on matters of public concern will often (as we said of employees' union activities) "engende[r] strong emotions and giv[e] rise to active rumors," and, critically, that "the example of employees who are discharged on false charges would or might have a deterrent effect on other employees." *NLRB* v. *Burnup & Sims, Inc.*, 379 U. S. 21, 23 (1964); see also *Rankin* v. *McPherson*, 483 U. S. 378, 384 (1987) ("'[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech'") (quoting *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 574 (1968)). As the plurality's opinion frankly recognizes, permitting public employers to punish employees in reliance on third-party reports "involve[s] some risk of erroneously punishing protected speech." *Ante,* at 676.

This is a risk that the public employer's interests justify tolerating, as the plurality's opinion explains, but only when the public employer's conduct was reasonable, see *ante,* at 677–678, and only when the employer "really did believe" the third-party report, *ante,* at 679; see also *ante,* at 680 (an employer need not investigate further " 'if the belief an employer forms supporting its adverse personnel action is "reasonable" ' ") (citation omitted); *ante,* at 677 (courts must "look to the facts as the employer reasonably found them to be") (emphasis deleted).* A public employer who did not really believe that the employee engaged in disruptive or otherwise punishable speech can assert no legitimate interest strong enough to justify chilling protected expression, whether the employer affirmatively disbelieved the third-party report or merely doubted its accuracy. Imposing liability on such an employer respects the "longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office." *Connick* v. *Myers,* 461 U. S. 138, 154 (1983).

Accordingly, even though petitioners conducted an objectively reasonable investigation into Ballew's report about respondent Churchill's conversation with Perkins-Graham, I believe that petitioners' dismissal of Churchill would have violated the Free Speech Clause if after the investigation they doubted the accuracy of the report and fired Churchill for speech, or for a portion of her speech, that they genuinely suspected was nondisruptive (assuming that the speech was actually on a matter of public concern). Though under the plurality's opinion the presentation of such an argument is open to Churchill on remand, Churchill would not, of course, have to rely on it if she can establish that, despite the reasonable investigation, petitioners believed that Churchill said nothing disruptive in her conversation with Perkins-Graham; that they believed that Churchill made some nondisruptive remarks to Perkins-Graham and fired her because of those remarks; or that they fired her because of nondisruptive comments about cross-training they knew she made earlier (again, assuming in each case that the speech at issue was on a matter of public concern).

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*In addition, and also because of the risk of chilling protected expression, the public employer must believe that the discipline chosen is an appropriate, and not excessive, response to the employee's speech as reported. I do not understand respondents in this case to raise any claim that the discharge was pretextual in this respect.

II

Though JUSTICE O'CONNOR's opinion speaks for just four Members of the Court, the reasonableness test it sets out is clearly the one that lower courts should apply. A majority of the Court agrees that employers whose conduct survives the plurality's reasonableness test cannot be held constitutionally liable (assuming the absence of pretext), see *ante*, at 679–681 (plurality opinion); *post*, at 686–692 (SCALIA, J., concurring in judgment); and a majority (though a different one) is of the view that employers whose conduct fails the plurality's reasonableness test have violated the Free Speech Clause, see *ante*, at 677–678 (plurality opinion); *post*, at 694–699 (STEVENS, J., dissenting); see also *post*, at 697–698, n. 4 (STEVENS, J., dissenting) ("JUSTICE O'CONNOR appropriately rejects [JUSTICE SCALIA's] position, at least for those instances in which the employer unreasonably believes an incorrect report concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with JUSTICE O'CONNOR that discipline in such circumstances violates the First Amendment"). Accordingly, the plurality opinion may be taken to state the holding of the Court. See *Marks* v. *United States*, 430 U. S. 188, 193–194 (1977) (discussing *Book Named "John Cleland's*

Memoirs of a Woman of Pleasure" v. *Attorney General of Mass.*, 383 U. S. 413 (1966)).

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

The central issue in this case is whether we shall adhere to our previously stated rule that a public employer's disciplining of an employee violates the Speech and Press Clause of the First Amendment only if it is in retaliation for the employee's speech on a matter of public concern. JUSTICE O'CONNOR would add to this prohibition a requirement that the employer conduct an investigation before taking disciplinary action in certain circumstances. This recognition of a broad new First Amendment procedural right is in my view unprecedented, superfluous to the decision in the present case, unnecessary for protection of public-employee speech on matters of public concern, and unpredictable in its application and consequences.

I

I do not doubt that the First Amendment contains within it some procedural prescriptions—that in some circumstances, "the freedom of speech" recognized by the Constitution consisted of a right to speak unless and until certain procedures to prevent the speech had first been complied with. Thus, for example, I have no quarrel in principle with (though I have not inquired into the historical justification for) decisions such as *Freedman* v. *Maryland,* 380 U. S. 51 (1965), which established the administrative and judicial review provisions that a film licensing process must contain in order to avoid constituting an unconstitutional prior restraint, see *Patterson* v. *Colorado ex rel. Attorney General of Colo.*, 205 U. S. 454, 462 (1907) (Holmes, J.).

We have, however, been most circumspect about acknowledging procedural components of the First Amendment. Almost all of the cases JUSTICE O'CONNOR cites as exemplars are elaborations upon the limitation on defamation suits first announced in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). See, *e. g., Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U. S. 485 (1984); *Philadelphia Newspapers, Inc.* v. *Hepps,* 475 U. S. 767 (1986); *Masson* v. *New Yorker Magazine, Inc.,* 501 U. S. 496 (1991). These cases deal with alleged governmental deprivation of the freedom of speech specifically *through the judicial process,* in which context procedures are necessarily central to the discussion.* *Speiser* v. *Randall,* 357 U. S. 513 (1958), also involved judicial (and pre-judicial adjudicative) process, holding that a state tax deduction could not be denied for a speech-related reason (advocacy of overthrow of the Government of the United States or of the State by unlawful means) by placing the burden of *dis*proving that speech-related reason upon the taxpayer. Moreover, although the existence of a First Amendment right was central to the Court's reasoning, the decision was squarely rested on the Due Process Clause, see *id.,* at 529, and not on the First Amendment, see *id.,* at 517, n. 3. The last case cited by JUSTICE O'CONNOR, *Freedman, supra,* was, as I described earlier, a prior restraint case; review and requirement of procedures were to be expected.

In today's opinion by JUSTICE O'CONNOR, our previous parsimony is abandoned, in favor of a general principle that "it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures," *ante,* at 669. Although we are assured that "not every procedure that may safeguard protected speech is constitutionally mandated," *ante,* at 670, the implication of that assurance is that many are. We never are informed how to tell mandated speech-safeguarding procedures from nonmandated ones, except for the clue that "each procedure involves a different mix of administrative burden, risk of erroneous punishment of

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*Moreover, the remedy in that context is self-evident: remand for readjudication pursuant to the proper procedures. In the present context, by contrast, the remedy is not all clear, see *infra,* at 693–694.

protected speech, and risk of erroneous exculpation of unprotected speech," *ibid.*

The proposed right to an investigation before dismissal for speech not only expands the concept of "First Amendment procedure" into brand new areas, but brings it into disharmony with our cases involving government employment decided under the Due Process Clause. As JUSTICE O'CONNOR acknowledges, see *ante,* at 678, those cases hold that public employees who, like Churchill, lack a protected property interest in their jobs, are not entitled to any sort of a hearing before dismissal. See, *e. g., Board of Regents of State Colleges* v. *Roth,* 408 U. S. 564, 577–578 (1972). Such employees can be dismissed with impunity (insofar as federal constitutional protections are concerned) for the reason, *accurate or not,* that they are incompetent, that they have been guilty of unexcused absences, that they have stolen money from the faculty honor bar—or indeed *for no reason at all.* But under JUSTICE O'CONNOR's opinion, if a reason happens to be given, and if the reason relates to speech and "there is a substantial likelihood that what was actually said was protected," (whatever that means), *ante,* at 677, an investigation to assure that the speech was not the sort protected by the First Amendment must be conducted—after which, presumably, the dismissal can still proceed even if the speech was not what the employer had thought it was, so long as it was not speech on an issue of public importance. In the present case, for example, if the requisite "First Amendment investigation" disclosed that Nurse Churchill had not been demeaning her superiors, but had been complaining about the perennial end-of-season slump of the Chicago Cubs, her dismissal, erroneous as it was, would have been perfectly OK.

This is a strange jurisprudence indeed. And the reason it is strange is that JUSTICE O'CONNOR has in effect converted the government employer's First Amendment liability with respect to "public concern" speech from liability for intentional wrong to liability for mere negligence. What she proposes is, at bottom, not new procedural protections for established First Amendment rights, but rather new First Amendment rights. *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968), did not require government-employer "protection" of "public concern" speech, but merely forbade government-employer hostility to such speech. "[I]t is essential," *Pickering* said, "that [public employees] be able to speak out freely on such questions without fear of *retaliatory* dismissal." *Id.*, at 572 (emphasis added). See also *Connick* v. *Myers*, 461 U. S. 138, 149 (1983) (same). The critical inquiry for the factfinder in these cases is whether the employment decision was, "in fact, made in retaliation for [the] exercise of the constitutional right of free speech." *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972). A category of employee speech is certainly not being "retaliated against" if it is no more and no less subject to being mistaken for a disciplinable infraction than is any other category of speech or conduct.

II

The creation of procedural First Amendment rights in this case is all the more remarkable because it is unnecessary to the disposition of the matter. After imposing the new duty upon government employers, JUSTICE O'CONNOR's opinion concludes that it was satisfied anyway—*i. e.*, that the investigation conducted by the hospital was "entirely reasonable." *Ante*, at 680. And then, to make the creation of the new duty doubly irrelevant, it finds that the case must be remanded anyway for a pretext inquiry: whether "petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier." *Ante*, at 682; see also *ante*, at 682–685 (SOUTER, J., concurring). Surely this offends the doctrine that constitutional questions that need not be addressed should be avoided.

The requirement of a pretext inquiry, I think, renders creation of the new First Amendment right of investigation not only superfluous to the disposition of the present case, but superfluous to the protection of previously established speech rights. JUSTICE O'CONNOR makes no attempt to justify the right of investigation on historical grounds (it is quite unheard of). The entire asserted basis for it is pragmatic and functional: without it the government employee's right not to be fired for his speech cannot be protected. The availability of a pretext inquiry disproves that argument. Judicial inquiry into the genuineness of a public employer's asserted permissible justification for an employment decision—be it unprotected speech, general insubordination, or laziness—is all that is necessary to avoid the targeting of "public interest" speech condemned in *Pickering.*

Our cases have hitherto considered this sort of inquiry all the protection needed. *Mt. Healthy City Bd. of Ed.* v. *Doyle,* 429 U. S. 274 (1977), involved an arguably weaker case for the public employer than the present one, in that there was a "mixed motive" for the disciplinary action—that is, the employer admitted that the "public concern" speech was part of the reason for the discharge, but asserted that other valid reasons were in any event sufficient. In deciding that case, we found no need to invent procedural requirements, but simply directed the District Court "to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's [e]mployment even in the absence of the protected conduct." *Id.,* at 287. The objective, we said, was to "protec[t] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Ibid.*

The Court considers "pretext" analysis sufficient in many other areas. See, *e. g., Eastman Kodak Co.* v. *Image Techni-*

cal Services, Inc., 504 U. S. 451, 484 (1992) (antitrust laws); *Hernandez* v. *New York*, 500 U. S. 352, 363–364 (1991) (plurality opinion) (constitutionality of peremptory challenges); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 187–188 (1989) (employment discrimination suit under 42 U. S. C. § 1981); *New York* v. *Burger*, 482 U. S. 691, 716–717, n. 27 (1987) (Fourth Amendment challenge to administrative searches); *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 895–896, n. 6 (1984) (unfair labor practice suit under the National Labor Relations Act); *Geduldig* v. *Aiello*, 417 U. S. 484, 496–497, n. 20 (1974) (Equal Protection Clause sex-discrimination claim against legislation); *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804–805 (1973) (discrimination claim under Title VII). And it considers "pretext" analysis sufficient in other First Amendment contexts. For example, in *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 54 (1986), after holding that zoning laws restricting the location of movie theaters do not violate the First Amendment unless they are a pretext for preventing free speech, we did not think it necessary to prescribe "reasonable" procedures for zoning commissions across the Nation; we left it to factfinders to determine whether zoning regulations are prompted by legitimate or improper factors. See also *Arcara* v. *Cloud Books, Inc.*, 478 U. S. 697, 708 (1986) (O'CONNOR, J., concurring) (same). There is no reason why the same approach should not suffice here.

JUSTICE STEVENS believes that "pretext" review is inadequate, since "it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights"; and "[o]rdinarily," he contends, "when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion." *Post*, at 696. But that is true in contractual realms only to the extent that the contract provides a "right" whose elimination constitutes a legal "detriment." An employee dismissable at will *can* be fired on the basis of an erroneous factual judgment, with no legal recourse—which is what happened here. Churchill also had a *non*contractual right: the right not to be dismissed (even from an at-will government job) in retaliation for her expression of views on a matter of public concern. That right was not violated, since she was dismissed for another reason, erroneous though it may have been. The issue before us has nothing to do with according the deprivation of a right the ordinary degree of protection; it has to do with expanding the protection accorded a government employee's public interest speech from (1) protection against retaliation, to (2) protection against retaliation and mistake.

III

The approach to this case adopted by JUSTICE O'CONNOR's opinion provides more questions than answers, subjecting public employers to intolerable legal uncertainty. Despite the difficulties courts already encounter in distinguishing between protected and unprotected speech, see, *e. g., Miller* v. *California*, 413 U. S. 15, 22 (1973), and in determining whether speech pertains to a matter of public concern, compare *O'Connor* v. *Steeves*, 994 F. 2d 905, 915 (CA1), cert. denied, 510 U. S. 1024 (1993), with *Gillum* v. *City of Kerrville*, 3 F. 3d 117, 120–121 (CA5 1993), cert. denied, 510 U. S. 1072 (1994), JUSTICE O'CONNOR creates yet another speech-related puzzlement that government employers, judges, and juries must struggle to solve. The new constitutional duty to provide certain minimum procedural protections is triggered when "an employment action is based on what an employee supposedly said, and a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected," *ante*, at 677. But on what does the "reasonable supervisor" base his judgment as to whether "there is a substantial likelihood that what was actually said was protected?" Can he base it upon the *report* of what was said? Seemingly not, since otherwise JUSTICE O'CONNOR would not have found the minimum procedural protection of investigation to have been required in the present case (the report of Churchill's conversation gave no hint of protected speech). It remains entirely unclear what the employer's judgment *must* be based on. To avoid liability, he had better assume that it must be based on *what was actually said*—which means that he had better investigate the incident in order to determine whether he has an obligation to investigate the incident. Hopefully I am wrong, however, and (despite today's holding) the basis for judging whether investigation is required will be solely the *report*. Then the public employer will only have to figure out what a hypothetical reasonable supervisor would infer about actual speech from that report, and then determine whether that constructed "actual speech" has a substantial likelihood of being on a matter of public concern. May the employer at least assume that no investigation is required if the report does not *mention* speech? Or can he be liable if the recommended basis for the discipline (for example, "disrupting the workplace") had a substantial likelihood of involving speech which would have had a substantial likelihood of being on a subject of public concern? I suppose ultimately it will be up to the jury to answer all these nice, once-removed questions. Or come to think of it, perhaps it will be up to the judge. JUSTICE O'CONNOR does not specify whether all this is a question of law or fact.

JUSTICE O'CONNOR states that "employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be." *Ante*, at 677 (emphasis in original). This explains the subsequent course of events when the employer's investigation has been found reasonable: The court (or the jury) decides whether, on the facts as found by the employer, the speech was on a matter of public concern, and if not, whether the employer's reliance on the report was pretextual. But what happens when the employer's investigation has been found unreasonable? I presume that there has then been established a violation of the procedural component of the First Amendment—the failure to treat possibly protected speech with the requisite "amount of care"—without regard to whether the employee's speech was in fact on a matter of public concern. JUSTICE O'CONNOR does not reveal what the remedy for this violation is to be. There are various possibilities: One could say that the discharge without observance of the constitutionally requisite procedures is invalid, and must be set aside unless and until those procedures are complied with. Alternatively, one could charge the employer who failed to conduct a reasonable investigation with knowledge of the protected speech that a jury later finds—producing a sort of constructive retaliatory discharge, and entitling the employee to full reinstatement and damages. Or alternatively again, the jury could be required to determine what information a reasonable investigation would have turned up, and then to decide whether it would have been permissible for the employer to fire the employee based on that information.

These are only a few of the numerous questions left unanswered by JUSTICE O'CONNOR's opinion. Loose ends are the inevitable consequence of judicial invention. We will spend decades trying to improvise the limits of this new First Amendment procedure that is unmentioned in text and unformed by tradition. It seems to me clear that game is not worth the candle, given the adequacy of "pretext" analysis to protect the constitutional interest at stake.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

This is a free country. Every American has the *right* to express an opinion on issues of public significance. In the private sector, of course, the exercise of that right may entail unpleasant consequences. Absent some contractual or statutory provision limiting its prerogatives, a private-sector employer may discipline or fire employees for speaking their minds. The First Amendment, however, demands that the government respect its employees' freedom to express their opinions on issues of public importance. As long as that expression is not unduly disruptive, it simply may not provide the basis for discipline or termination. The critical issues in a case of this kind are (1) whether the speech is protected, and (2) whether it was the basis for the sanction imposed on the employee.

Applying these standards to the case before us is quite straightforward. Everyone agrees that respondent Cheryl Churchill was fired because of what she said in a conversation with co-workers during a dinner break. Given the posture in which this case comes to us, we must assume that Churchill's statements were fully protected by the First Amendment.[1] Nevertheless, the plurality concludes that a dismissal for speech is valid as a matter of law as long as the public employer reasonably believed that the employee's speech was unprotected. See *ante,* at 677–678. This conclusion is erroneous because it provides less protection for a fundamental constitutional right than the law ordinarily provides for less exalted rights, including contractual and statutory rights applicable in the private sector.

If, for example, a hospital employee had a contract providing that she could retain her job for a year if she followed the employer's rules and did competent work, that employee could not be fired because her supervisor reasonably but mistakenly believed she had been late to work or given a patient the wrong medicine. Ordinarily, when someone acts to another person's detriment based upon a factual judgment, the actor assumes the risk that an impartial adjudicator may come to a different conclusion.[2] Our legal system generally delegates the determination of facts upon which important rights depend to neutral factfinders, notwithstanding the attendant risks of error and overdeterrence.

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[1] On review of the Court of Appeals' reversal of a summary judgment for petitioners, we naturally accept as true the version of Churchill's statements described in her testimony and that of two supporting witnesses. See 977 F. 2d 1114, 1118–1126 (CA7 1992). According to Churchill, Thomas Koch, and Jean Welty, the dinner-break conversation concerned the merits of hospital policy, and Churchill did not direct any "personal criticism" against her supervisors. See *id.,* at 1118–1119, 1122. According to two other witnesses, Melanie Perkins-Graham and Mary Lou Ballew, Churchill's speech was filled with "unkind and inappropriate . . . things," "negativism," and personal comment about petitioner Cynthia Waters and the hospital administration. *Id.,* at 1118–1119.

Federal constitutional rights merit at least the normal degree of protection. Doubts concerning the ability of juries to find the truth, an ability for which we usually have high regard, should be resolved in favor of, not against, the protection of First Amendment rights. See, *e. g., New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279–280 (1964). Unfortunately, the plurality underestimates the importance of freedom of speech for the more than 18 million civilian employees of this country's Federal, State, and local Governments,[3] and subordinates that freedom to an abstract interest in bureaucratic efficiency. The need for governmental efficiency that so concerns the plurality is amply protected by the substantive limits on public employees' rights of expression. See generally *Connick* v. *Myers*, 461 U. S. 138 (1983); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). Efficiency does not demand an *additional* layer of deference to employers' "reasonable" factual errors. Today's ruling will surely deter speech that would be fully protected under *Pickering* and *Connick*.

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[2] In *NLRB* v. *Burnup & Sims, Inc.,* 379 U. S. 21 (1964), two employee labor organizers were fired based upon a report that they had threatened to dynamite the employer's plant if a coming representation election was unsuccessful. The National Labor Relations Board found that the employees had never made the threatening statements. Although we recognized that the employer had acted in good faith, this Court held that the discharge "plainly violated" the organizers' right under §8 of the National Labor Relations Act. *Id.,* at 22. "Union activity," we observed, "often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith." *Id.,* at 23. The plurality does not explain why First Amendment rights should receive any lesser protection than the statutory right at issue in *Burnup & Sims.*

[3] See U. S. Dept. of Commerce, Statistical Abstract of the United States 318 (113 ed. 1993) (Table No. 500) (figure from 1991).

The plurality correctly points out that we have never decided whether the governing version of the facts in public employment free speech cases is "what the government employer thought was said, or . . . what the trier of fact ultimately determines to have been said." *Ante*, at 664.[4] To me it is clear that the latter must be controlling. The First Amendment assures public employees that they may express their views on issues of public concern without fear of discipline or termination as long as they do so in an appropriate manner and at an appropriate time and place. A violation occurs when a public employee is fired for uttering speech on a matter of public concern that is not unduly disruptive of the operations of the relevant agency. The violation does not vanish merely because the firing was based upon a reasonable mistake about what the employee said.[5] A First Amendment claimant need not allege bad faith; the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives, but whether the employee's freedom of speech has been "abridged."

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[4] JUSTICE SCALIA would recharacterize employees' right to free speech as a more modest protection against "retaliatory" discharges, a protection that would not extend to those terminated for speech that was fully protected but incorrectly reported. The only support he cites for this restrictive theory is that three of our prior public employment speech opinions have used the word "retaliation." See *ante*, at 688–689 (opinion concurring in judgment) (citing *Connick* v. *Myers*, 461 U. S. 138, 149 (1983); *Perry* v. *Sindermann*, 408 U. S. 593, 598 (1972); *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, 572 (1968)). Our use of that word in the cases JUSTICE SCALIA cites, however, does not resolve the present question, since none of those decisions involved any factual dispute over the content of employee speech. More importantly, other passages from two of those opinions support the view that the *causal* connection between the employee's speech and her discharge is all the "retaliation" that must be shown. See *Perry*, 408 U. S., at 598 (nonrenewal of a teacher's contract "may not be predicated on his exercise of First and Fourteenth Amendment rights"); *ibid.* ("[A] teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment"); *Pickering*, 391 U. S., at 574 ("In sum, . . . a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment"). Precedent certainly does not command JUSTICE SCALIA's approach, and nothing in the First Amendment recommends a rule that makes ignorance or mistake a complete defense for a discharge based on fully protected speech. JUSTICE O'CONNOR appropriately rejects that position, at least for those instances in which the employer unreasonably believes an incorrect report

The risk that a jury may ultimately view the facts differently from even a conscientious employer is not, as the plurality would have it, a needless fetter on public employers' ability to discharge their duties. It is the normal means by which our legal system protects legal rights and encourages those in authority to act with care. Here, for example, attention to "conclusions a jury would later draw," *ante,* at 676, about the content of Churchill's speech might have caused petitioners to talk to Churchill about what she said before deciding to fire her. There is nothing unfair or onerous

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concerning speech that was in fact protected and disciplines an employee based upon that misunderstanding. I, of course, agree with JUSTICE O'CONNOR that discipline in such circumstances violates the First Amendment.

[5] The reasonableness of the public employer's mistake would, of course, bear on whether that employer should be liable for damages. See *Butz* v. *Economou,* 438 U. S. 478, 507 (1978) ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law"). It is wrong, however, to constrict the substantive reach of a public employee's right of free speech in response to such remedial considerations. See *ante,* at 677 (government employers who use reasonable procedures should be free to act "without fear [of] *liability*") (emphasis added).

about putting the risk of error on an employer in these circumstances.[6]

Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion, such disagreements are both inevitable and desirable. When those who work together disagree, reports of speech are often skewed, and supervisors are apt to misconstrue even accurate reports. The plurality, observing that managers "can spend only so much of their time on any one employment decision," *ante*, at 680, adopts a rule that invites discipline, rather than further discussion, when such disputes arise. That rule is unwise, for deliberation within the government, like deliberation about it, is an essential part of our "profound national commitment" to the freedom of speech. Cf. *New York Times*, 376 U. S., at 270. A proper regard for that principle requires that, before firing a public employee for her speech, management get its facts straight.

I would affirm the judgment of the Court of Appeals.

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[6] Because there is no dispute that Churchill was fired for the content of her speech, this case does not involve the problem of determining whether the public employee would have been terminated anyway for reasons unrelated to speech. See *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274 (1977).

PUD NO. 1 OF JEFFERSON COUNTY ET AL. *v.* WASHINGTON DEPARTMENT OF ECOLOGY ET AL.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 92–1911. Argued February 23, 1994—Decided May 31, 1994

Section 303 of the Clean Water Act requires each State, subject to federal approval, to institute comprehensive standards establishing water quality goals for all intrastate waters, and requires that such standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Under Environmental Protection Agency (EPA) regulations, the standards must also include an antidegradation policy to ensure that "[e]xisting instream water uses and the level of water quality necessary to protect [those] uses [are] maintained and protected." States are required by § 401 of the Act to provide a water quality certification before a federal license or permit can be issued for any activity that may result in a discharge into intrastate navigable waters. As relevant here, the certification must "set forth any effluent limitations and other limitations . . . necessary to assure that any applicant" will comply with various provisions of the Act and "any other appropriate" state law requirement. § 401(d). Under Washington's comprehensive water quality standards, characteristic uses of waters classified as Class AA include fish migration, rearing, and spawning. Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River, a Class AA water, which would reduce the water flow in the relevant part of the river to a minimal residual flow of between 65 and 155 cubic feet per second (cfs). In order to protect the river's fishery, respondent state environmental agency issued a § 401 certification imposing, among other things, a minimum stream flow requirement of between 100 and 200 cfs. A state administrative appeals board ruled that the certification condition exceeded respondent's authority under state law, but the State Superior Court reversed. The State Supreme Court affirmed, holding that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows, and that § 401 authorized the stream flow condition and conferred on States power to consider all state action related to water quality in imposing conditions on § 401 certificates.

Held: Washington's minimum stream flow requirement is a permissible condition of a § 401 certification. Pp. 710–723.

(a) A State may impose conditions on certifications insofar as necessary to enforce a designated use contained in the State's water quality standard. Petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge" is contradicted by § 401(d)'s reference to an applicant's compliance, which allows a State to impose "other limitations" on a project. This view is consistent with EPA regulations providing that activities—not merely discharges—must comply with state water quality standards, a reasonable interpretation of § 401 which is entitled to deference. State standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. Although § 303 is not specifically listed in § 401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, and § 301 in turn incorporates § 303 by reference. EPA's view supports this interpretation. Such limitations are also permitted by § 401(d)'s reference to "any other appropriate" state law requirement. Pp. 710–713.

(b) Washington's requirement is a limitation necessary to enforce the designated use of the river as a fish habitat. Petitioners err in asserting that § 303 requires States to protect such uses solely through implementation of specific numerical "criteria." The section's language makes it plain that water quality standards contain two components and is most naturally read to require that a project be consistent with both: the designated use and the water quality criteria. EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. Moreover, the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics." There is no anomaly in the State's reliance on both use designations and criteria to protect water quality. Rather, it is petitioners' reading that leads to an unreasonable interpretation of the Act, since specified criteria cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect a State's hundreds of individual water bodies. Washington's requirement also is a proper application of the state and federal antidegradation regulations, as it ensures that an existing instream water use will be "maintained and protected." Pp. 713–719.

(c) Petitioners' assertion that the Act is only concerned with water quality, not quantity, makes an artificial distinction, since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution. Moreover, §§ 101(g) and 510(2) of the Act do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. Those provisions preserve each State's authority to allocate water quantity as between users, but the § 401 certification does not purport to determine petitioners' proprietary right to the river's water. In addition, the Court is unwilling to read implied limitations into § 401 based on petitioners' claim that a conflict exists between the condition's imposition and the Federal Energy Regulatory Commission's authority to license hydroelectric projects under the Federal Power Act, since FERC has not yet acted on petitioners' license application and since § 401's certification requirement also applies to other statutes and regulatory schemes. Pp. 719–723.

121 Wash. 2d 179, 849 P. 2d 646, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, *post,* p. 723. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post,* p. 724.

Howard E. Shapiro argued the cause for petitioners. With him on the briefs were *Michael A. Swiger, Gary D. Bachman, Albert R. Malanca,* and *Kenneth G. Kieffer.*

Christine O. Gregoire, Attorney General of Washington, argued the cause for respondents. With her on the briefs were *Jay J. Manning,* Senior Assistant Attorney General, and *William C. Frymire,* Assistant Attorney General.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Days, Acting Assistant Attorney General Schiffer, James A. Feldman,* and *Anne S. Almy.**

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*Briefs of *amici curiae* urging reversal were filed for the American Forest & Paper Association et al. by *John R. Molm, Winifred D. Simpson,* and *James A. Lamberth;* for Niagara Mohawk Power Corp. by *Edward Berlin, Kenneth G. Jaffe, Paul J. Kaleta, Brian K. Billinson,* and *Timothy P. Sheehan;* for the Northwest Hydroelectric Association by *Richard M. Glick* and *Lory J. Kraut;* for Pacific Northwest Utilities by *Sherilyn Peterson* and *R. Gerard Lutz;* and for the Western Urban Water Coalition by *Benjamin S. Sharp* and *Guy R. Martin.*

Briefs of *amici curiae* urging affirmance were filed for the State of Vermont et al. by *Jeffrey L. Amestoy,* Attorney General of Vermont, and *Ronald A. Shems,* Assistant Attorney General, *Robert Abrams,* Attorney

JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioners, a city and a local utility district, want to build a hydroelectric project on the Dosewallips River in Washington State. We must decide whether respondent state environmental agency (hereinafter respondent) properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs.

General of New York, and *Kathleen Liston Morrison*, Assistant Attorney General, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Richard Blumenthal*, Attorney General of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, *Robert A. Butterworth*, Attorney General of Florida, *Michael J. Bowers*, Attorney General of Georgia, *Robert A. Marks*, Attorney General of Hawaii, *Larry EchoHawk*, Attorney General of Idaho, *Roland A. Burris*, Attorney General of Illinois, *Pamela Fanning Carter*, Attorney General of Indiana, *Bonnie J. Campbell*, Attorney General of Iowa, *Robert T. Stephan*, Attorney General of Kansas, *Chris Gorman*, Attorney General of Kentucky, *Michael E. Carpenter*, Attorney General of Maine, *J. Joseph Curran, Jr.*, Attorney General of Maryland, *Scott Harshbarger*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Mike Moore*, Attorney General of Mississippi, *Jeremiah W. Nixon*, Attorney General of Missouri, *Joseph P. Mazurek*, Attorney General of Montana, *Don Stenberg*, Attorney General of Nebraska, *Frankie Sue Del Papa*, Attorney General of Nevada, *Jeffrey R. Howard*, Attorney General of New Hampshire, *Fred DeVesa*, Acting Attorney General of New Jersey, *Tom Udall*, Attorney General of New Mexico, *Michael F. Easley*, Attorney General of North Carolina, *Heidi Heitkamp*, Attorney General of North Dakota, *Lee Fisher*, Attorney General of Ohio, *Susan B. Loving*, Attorney General of Oklahoma, *Theodore R. Kulongoski*, Attorney General of Oregon, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Jefferey B. Pine*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Charles W. Burson*, Attorney General of Tennessee, *Dan Morales*, Attorney General of Texas, *Jan Graham*, Attorney General of Utah, *Stephen D. Rosenthal*, Attorney General of Virginia, *Darrell V. McGraw, Jr.*, Attorney General of West Virginia, *James E. Doyle*, Attorney General of Wisconsin, *Joseph B. Meyer*, Attorney General of Wyoming, and *John Payton*, Corporation Counsel of the District of Columbia; and for American Rivers et al. by *Paul M. Smith*.

I

This case involves the complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities. The Federal Water Pollution Control Act, commonly known as the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. § 1251 *et seq.*, is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). The Act also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." § 1251(a)(2).

To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments. Under the Act, the Administrator of the Environmental Protection Agency (EPA) is required, among other things, to establish and enforce technology-based limitations on individual discharges into the country's navigable waters from point sources. See §§ 1311, 1314. Section 303 of the Act also requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters. §§ 1311(b)(1)(C), 1313. These state water quality standards provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U. S. 200, 205, n. 12 (1976).

A state water quality standard "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U. S. C. § 1313(c)(2)(A). In setting standards, the State must comply with the following broad requirements:

> "Such standards shall be such as to protect the public health or welfare, enhance the quality of water and

> serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational [and other purposes.]" *Ibid.*

See also § 1251(a)(2).

A 1987 amendment to the Clean Water Act makes clear that § 303 also contains an "antidegradation policy"—that is, a policy requiring that state standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation. Specifically, the Act permits the revision of certain effluent limitations or water quality standards "only if such revision is subject to and consistent with the antidegradation policy established under this section." § 1313(d)(4)(B). Accordingly, EPA's regulations implementing the Act require that state water quality standards include "a statewide antidegradation policy" to ensure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 CFR § 131.12 (1993). At a minimum, state water quality standards must satisfy these conditions. The Act also allows States to impose more stringent water quality controls. See 33 U. S. C. §§ 1311(b)(1)(C), 1370. See also 40 CFR § 131.4(a) (1993) ("As recognized by section 510 of the Clean Water Act[, 33 U. S. C. § 1370], States may develop water quality standards more stringent than required by this regulation").

The State of Washington has adopted comprehensive water quality standards intended to regulate all of the State's navigable waters. See Washington Administrative Code (WAC) 173–201–010 to 173–201–120 (1986). The State created an inventory of all the State's waters, and divided the waters into five classes. 173–201–045. Each individual fresh surface water of the State is placed into one of these classes. 173–201–080. The Dosewallips River is classified AA, extraordinary. 173–201–080(32). The water quality standard for Class AA waters is set forth at 173–201–045(1). The standard identifies the designated uses of Class AA waters as well as the criteria applicable to such waters.[1]

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[1] WAC 173–201–045(1) (1986) provides in pertinent part:

"(1) Class AA (extraordinary).

"(a) General characteristic. Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses.

"(b) Characteristic uses. Characteristic uses shall include, but not be limited to, the following:

"(i) Water supply (domestic, industrial, agricultural).

"(ii) Stock watering.

"(iii) Fish and shellfish:

"Salmonid migration, rearing, spawning, and harvesting.

"Other fish migration, rearing, spawning, and harvesting.

. . . . .

"(iv) Wildlife habitat.

"(v) Recreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment).

"(vi) Commerce and navigation.

"(c) Water quality criteria

"(i) Fecal coliform organisms.

"(A) Freshwater—fecal coliform organisms shall not exceed a geometric mean value of 50 organisms/100 mL, with not more than 10 percent of samples exceeding 100 organisms/100 mL.

"(B) Marine water—fecal coliform organisms shall not exceed a geometric mean value of 14 organisms/100 mL, with not more than 10 percent of samples exceeding 43 organisms/100 mL.

"(ii) Dissolved oxygen [shall exceed specific amounts].

. . . . .

"(iii) Total dissolved gas shall not exceed 110 percent of saturation at any point of sample collection.

"(iv) Temperature shall not exceed [certain levels].

. . . . .

"(v) pH shall be within [a specified range].

"(vi) Turbidity shall not exceed [specific levels].

"(vii) Toxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use.

"(viii) Aesthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste."

In addition to these specific standards applicable to Class AA waters, the State has adopted a statewide antidegradation policy. That policy provides:

> "(a) Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed.
>
> "(b) No degradation will be allowed of waters lying in national parks, national recreation areas, national wildlife refuges, national scenic rivers, and other areas of national ecological importance.
>
> . . . . .
>
> "(f) In no case, will any degradation of water quality be allowed if this degradation interferes with or becomes injurious to existing water uses and causes long-term and irreparable harm to the environment." 173–201–035(8).

As required by the Act, EPA reviewed and approved the State's water quality standards. See 33 U. S. C. § 1313(c)(3); 42 Fed. Reg. 56792 (1977). Upon approval by EPA, the state standard became "the water quality standard for the applicable waters of that State." 33 U. S. C. § 1313(c)(3).

States are responsible for enforcing water quality standards on intrastate waters. § 1319(a). In addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U. S. C. § 1341. Specifically, § 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U. S. C. § 1341(a). Section 401(d) further provides that "[a]ny certification . . . shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant . . . will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] . . . and with any other appropriate requirement of State law set forth in such certification." 33 U. S. C. § 1341(d). The limitations included in the certification become a condition on any federal license. *Ibid.*[2]

II

Petitioners propose to build the Elkhorn Hydroelectric Project on the Dosewallips River. If constructed as presently planned, the facility would be located just outside the Olympic National Park on federally owned land within the Olympic National Forest. The project would divert water from a 1.2-mile reach of the river (the bypass reach), run the water through turbines to generate electricity and then return the water to the river below the bypass reach. Under the Federal Power Act (FPA), 41 Stat. 1063, as amended, 16 U. S. C. § 791a *et seq.*, the Federal Energy Regulatory Commission (FERC) has authority to license new hydroelectric facilities. As a result, petitioners must get a FERC license to build or operate the Elkhorn Project. Because a federal license is required, and because the project may result in discharges into the Dosewallips River, petitioners are also required to obtain state certification of the project pursuant to § 401 of the Clean Water Act, 33 U. S. C. § 1341.

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[2] Section 401, as set forth in 33 U. S. C. § 1341, provides in relevant part:

"(a) Compliance with applicable requirements; application; procedures; license suspension

"(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

. . . . .

"(d) Limitations and monitoring requirements of certification

"Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section."

The water flow in the bypass reach, which is currently undiminished by appropriation, ranges seasonally between 149 and 738 cubic feet per second (cfs). The Dosewallips supports two species of salmon, coho and chinook, as well as steelhead trout. As originally proposed, the project was to include a diversion dam which would completely block the river and channel approximately 75% of the river's water into a tunnel alongside the streambed. About 25% of the water would remain in the bypass reach, but would be returned to the original riverbed through sluice gates or a fish ladder. Depending on the season, this would leave a residual minimum flow of between 65 and 155 cfs in the river. Respondent undertook a study to determine the minimum stream flows necessary to protect the salmon and steelhead fishery in the bypass reach. On June 11, 1986, respondent issued a § 401 water quality certification imposing a variety of conditions on the project, including a minimum stream flow requirement of between 100 and 200 cfs depending on the season.

A state administrative appeals board determined that the minimum flow requirement was intended to enhance, not merely maintain, the fishery, and that the certification condition therefore exceeded respondent's authority under state law. App. to Pet. for Cert. 55a–57a. On appeal, the

State Superior Court concluded that respondent could require compliance with the minimum flow conditions. *Id.*, at 29a–45a. The Superior Court also found that respondent had imposed the minimum flow requirement to protect and preserve the fishery, not to improve it, and that this requirement was authorized by state law. *Id.*, at 34a.

The Washington Supreme Court held that the antidegradation provisions of the State's water quality standards require the imposition of minimum stream flows. 121 Wash. 2d 179, 186–187, 849 P. 2d 646, 650 (1993). The court also found that § 401(d), which allows States to impose conditions based upon several enumerated sections of the Clean Water Act and "any other appropriate requirement of State law," 33 U. S. C. § 1341(d), authorized the stream flow condition. Relying on this language and the broad purposes of the Clean Water Act, the court concluded that § 401(d) confers on States power to "consider all state action related to water quality in imposing conditions on section 401 certificates." 121 Wash. 2d, at 192, 849 P. 2d, at 652. We granted certiorari, 510 U. S. 810 (1993), to resolve a conflict among the state courts of last resort. See 121 Wash. 2d 179, 849 P. 2d 646 (1993); *Georgia Pacific Corp.* v. *Dept. of Environmental Conservation*, 159 Vt. 639, 628 A. 2d 944 (1992) (table); *Power Authority of New York* v. *Williams*, 60 N. Y. 2d 315, 457 N. E. 2d 726 (1983). We now affirm.

III

The principal dispute in this case concerns whether the minimum stream flow requirement that the State imposed on the Elkhorn Project is a permissible condition of a § 401 certification under the Clean Water Act. To resolve this dispute we must first determine the scope of the State's authority under § 401. We must then determine whether the limitation at issue here, the requirement that petitioners maintain minimum stream flows, falls within the scope of that authority.

A

There is no dispute that petitioners were required to obtain a certification from the State pursuant to § 401. Petitioners concede that, at a minimum, the project will result in two possible discharges—the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace after the water has been used to generate electricity. Brief for Petitioners 27–28. Petitioners contend, however, that the minimum stream flow requirement imposed by the State was unrelated to these specific discharges, and that as a consequence, the State lacked the authority under § 401 to condition its certification on maintenance of stream flows sufficient to protect the Dosewallips fishery.

If § 401 consisted solely of subsection (a), which refers to a state certification that a "discharge" will comply with certain provisions of the Act, petitioners' assessment of the scope of the State's certification authority would have considerable force. Section 401, however, also contains subsection (d), which expands the State's authority to impose conditions on the certification of a project. Section 401(d) provides that any certification shall set forth "any effluent limitations and other limitations . . . necessary to assure that *any applicant*" will comply with various provisions of the Act and appropriate state law requirements. 33 U. S. C. § 1341(d) (emphasis added). The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a "discharge." The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose "other limitations" on the project in general to assure compliance with various provisions of the Clean Water Act and with "any other appropriate requirement of State law." Although the dissent asserts that this interpretation of § 401(d) renders § 401(a)(1) superfluous, *post*, at 726, we see no such anomaly. Section 401(a)(1) identifies the category of activities subject to certification—namely, those with discharges. And §401(d) is most reasonably read as authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied.

Our view of the statute is consistent with EPA's regulations implementing §401. The regulations expressly interpret §401 as requiring the State to find that "there is a reasonable assurance that the *activity* will be conducted in a manner which will not violate applicable water quality standards." 40 CFR §121.2(a)(3) (1993) (emphasis added). See also EPA, Wetlands and 401 Certification 23 (Apr. 1989) ("In 401(d), the Congress has given the States the authority to place any conditions on a water quality certification that are necessary to assure that the applicant will comply with effluent limitations, water quality standards, . . . and with 'any other appropriate requirement of State law' "). EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards is a reasonable interpretation of §401, and is entitled to deference. See, *e. g., Arkansas* v. *Oklahoma*, 503 U. S. 91, 110 (1992); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

Although §401(d) authorizes the State to place restrictions on the activity as a whole, that authority is not unbounded. The State can only ensure that the project complies with "any applicable effluent limitations and other limitations, under [33 U. S. C. §§1311, 1312]" or certain other provisions of the Act, "and with any other appropriate requirement of State law." 33 U. S. C. §1341(d). The State asserts that the minimum stream flow requirement was imposed to ensure compliance with the state water quality standards adopted pursuant to §303 of the Clean Water Act, 33 U. S. C. §1313.

We agree with the State that ensuring compliance with §303 is a proper function of the §401 certification. Although §303 is not one of the statutory provisions listed in §401(d), the statute allows States to impose limitations to ensure compliance with § 301 of the Act, 33 U. S. C. § 1311. Section 301 in turn incorporates § 303 by reference. See 33 U. S. C. § 1311(b)(1)(C); see also H. R. Conf. Rep. No. 95–830, p. 96 (1977) ("Section 303 is always included by reference where section 301 is listed"). As a consequence, state water quality standards adopted pursuant to § 303 are among the "other limitations" with which a State may ensure compliance through the § 401 certification process. This interpretation is consistent with EPA's view of the statute. See 40 CFR § 121.2(a)(3) (1992); EPA, Wetlands and 401 Certification, *supra*. Moreover, limitations to assure compliance with state water quality standards are also permitted by § 401(d)'s reference to "any other appropriate requirement of State law." We do not speculate on what additional state laws, if any, might be incorporated by this language.[3] But at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are "appropriate" requirements of state law. Indeed, petitioners appear to agree that the State's authority under § 401 includes limitations designed to ensure compliance with state water quality standards. Brief for Petitioners 9, 21.

B

Having concluded that, pursuant to § 401, States may condition certification upon any limitations necessary to ensure compliance with state water quality standards or any other "appropriate requirement of State law," we consider whether the minimum flow condition is such a limitation. Under § 303, state water quality standards must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U. S. C. § 1313(c)(2)(A). In imposing the minimum stream flow requirement, the State determined that construction and operation of the project as planned would be inconsistent with one of the designated uses of Class AA water, namely "[s]almonid [and other fish] migration, rearing, spawning, and harvesting." App. to Pet. for Cert. 83a–84a. The designated use of the river as a fish habitat directly reflects the Clean Water Act's goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). Indeed, the Act defines pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19). Moreover, the Act expressly requires that, in adopting water quality standards, the State must take into consideration the use of waters for "propagation of fish and wildlife." § 1313(c)(2)(A).

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[3] The dissent asserts that § 301 is concerned solely with discharges, not broader water quality standards. *Post*, at 730, n. 2. Although § 301 does make certain discharges unlawful, see 33 U. S. C. § 1311(a), it also contains a broad enabling provision which requires States to take certain actions, to wit: "In order to carry out the objective of this chapter [viz. the chemical, physical, and biological integrity of the Nation's water] there shall be achieved . . . not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, . . . established pursuant to any State law or regulations . . . ." 33 U. S. C. § 1311(b)(1)(C). This provision of § 301 expressly refers to state water quality standards, and is not limited to discharges.

Petitioners assert, however, that § 303 requires the State to protect designated uses solely through implementation of specific "criteria." According to petitioners, the State may not require them to operate their dam in a manner consistent with a designated "use"; instead, say petitioners, under § 303 the State may only require that the project comply with specific numerical "criteria."

We disagree with petitioners' interpretation of the language of § 303(c)(2)(A). Under the statute, a water quality standard must "consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." 33 U. S. C. § 1313(c)(2)(A) (emphasis added). The text makes it plain that water quality standards contain two components. We think the language of § 303 is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria. Accordingly, under the literal terms of the statute, a project that does not comply with a designated use of the water does not comply with the applicable water quality standards.

Consequently, pursuant to § 401(d) the State may require that a permit applicant comply with both the designated uses and the water quality criteria of the state standards. In granting certification pursuant to § 401(d), the State "shall set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law." A certification requirement that an applicant operate the project consistently with state water quality standards—*i. e.*, consistently with the designated uses of the water body and the water quality criteria—is both a "limitation" to assure "compl[iance] with . . . limitations" imposed under § 303, and an "appropriate" requirement of state law.

EPA has not interpreted § 303 to require the States to protect designated uses exclusively through enforcement of numerical criteria. In its regulations governing state water quality standards, EPA defines criteria as "*elements* of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 CFR § 131.3(b) (1993) (emphasis added). The regulations further provide that "[w]hen criteria are met, water quality will *generally* protect the designated use." *Ibid.* (emphasis added). Thus, the EPA regulations implicitly recognize that in some circumstances, criteria alone are insufficient to protect a designated use.

Petitioners also appear to argue that use requirements are too open ended, and that the Act only contemplates enforcement of the more specific and objective "criteria." But this argument is belied by the open-ended nature of the criteria themselves. As the Solicitor General points out, even "criteria" are often expressed in broad, narrative terms, such as "'there shall be no discharge of toxic pollutants in toxic amounts.'" Brief for United States as *Amicus Curiae* 18. See *American Paper Institute, Inc.* v. *EPA*, 996 F. 2d 346, 349 (CADC 1993). In fact, under the Clean Water Act, only one class of criteria, those governing "toxic pollutants listed pursuant to section 1317(a)(1)," need be rendered in numerical form. See 33 U. S. C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2) (1993).

Washington's Class AA water quality standards are typical in that they contain several open-ended criteria which, like the use designation of the river as a fishery, must be translated into specific limitations for individual projects. For example, the standards state that "[t]oxic, radioactive, or deleterious material concentrations shall be less than those which may affect public health, the natural aquatic environment, or the desirability of the water for any use." WAC 173–201–045(1)(c)(vii) (1986). Similarly, the state standards specify that "[a]esthetic values shall not be impaired by the presence of materials or their effects, excluding those of natural origin, which offend the senses of sight, smell, touch, or taste." 173–201–045(1)(c)(viii). We think petitioners' attempt to distinguish between uses and criteria loses much of its force in light of the fact that the Act permits enforcement of broad, narrative criteria based on, for example, "aesthetics."

Petitioners further argue that enforcement of water quality standards through use designations renders the water quality criteria component of the standards irrelevant. We see no anomaly, however, in the State's reliance on both use designations and criteria to protect water quality. The specific numerical limitations embodied in the criteria are a convenient enforcement mechanism for identifying minimum water conditions which will generally achieve the requisite water quality. And, in most circumstances, satisfying the criteria will, as EPA recognizes, be sufficient to maintain the designated use. See 40 CFR § 131.3(b) (1993). Water quality standards, however, apply to an entire class of water, a class which contains numerous individual water bodies. For example, in the State of Washington, the Class AA water quality standard applies to 81 specified fresh surface waters, as well as to all "surface waters lying within the mountainous regions of the state assigned to national parks, national forests, and/or wilderness areas," all "lakes and their feeder streams within the state," and all "unclassified surface waters that are tributaries to Class AA waters." WAC 173–201–070 (1986). While enforcement of criteria will in general protect the uses of these diverse waters, a complementary requirement that activities also comport with designated uses enables the States to ensure that each activity—even if not foreseen by the criteria—will be consistent with the specific uses and attributes of a particular body of water.

Under petitioners' interpretation of the statute, however, if a particular criterion, such as turbidity, were missing from the list contained in an individual state water quality standard, or even if an existing turbidity criterion were insufficient to protect a particular species of fish in a particular river, the State would nonetheless be forced to allow activities inconsistent with the existing or designated uses. We think petitioners' reading leads to an unreasonable interpretation of the Act. The criteria components of state water quality standards attempt to identify, for all the water bodies in a given class, water quality requirements generally sufficient to protect designated uses. These criteria, however, cannot reasonably be expected to anticipate all the water quality issues arising from every activity that can affect the State's hundreds of individual water bodies. Requiring the States to enforce only the criteria component of their water quality standards would in essence require the States to study to a level of great specificity each individual surface water to ensure that the criteria applicable to that water are sufficiently detailed and individualized to fully protect the water's designated uses. Given that there is no textual support for imposing this requirement, we are loath to attribute to Congress an intent to impose this heavy regulatory burden on the States.

The State also justified its minimum stream flow as necessary to implement the "antidegradation policy" of § 303, 33 U. S. C. § 1313(d)(4)(B). When the Clean Water Act was enacted in 1972, the water quality standards of all 50 States had antidegradation provisions. These provisions were required by federal law. See U. S. Dept. of Interior, Federal Water Pollution Control Administration, Compendium of Department of Interior Statements on Non-degradation of Interstate Waters 1–2 (Aug. 1968); see also Hines, A Decade of Nondegradation Policy in Congress and the Courts: The Erratic Pursuit of Clean Air and Clean Water, 62 Iowa L. Rev. 643, 658–660 (1977). By providing in 1972 that existing state water quality standards would remain in force until revised, the Clean Water Act ensured that the States would continue their antidegradation programs. See 33 U. S. C. § 1313(a). EPA has consistently required that revised state standards incorporate an antidegradation policy. And, in 1987, Congress explicitly recognized the existence of an "antidegradation policy established under [§ 303]." § 1313(d)(4)(B).

EPA has promulgated regulations implementing § 303's antidegradation policy, a phrase that is not defined elsewhere in the Act. These regulations require States to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." 40 CFR § 131.12 (1993). These "implementation methods shall, at a minimum, be consistent with the . . . [e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." *Ibid.* EPA has explained that under its antidegradation regulation, "no activity is allowable . . . which could partially or completely eliminate any existing use." EPA, Questions and

Answers on Antidegradation 3 (Aug. 1985). Thus, States must implement their antidegradation policy in a manner "consistent" with existing uses of the stream. The State of Washington's antidegradation policy in turn provides that "[e]xisting beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed." WAC 173-201-035(8)(a) (1986). The State concluded that the reduced stream flows would have just the effect prohibited by this policy. The Solicitor General, representing EPA, asserts, Brief for United States as *Amicus Curiae* 18–21, and we agree, that the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an "[e]xisting instream water us[e]" will be "maintained and protected." 40 CFR § 131.12(a)(1) (1993).

Petitioners also assert more generally that the Clean Water Act is only concerned with water "quality," and does not allow the regulation of water "quantity." This is an artificial distinction. In many cases, water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation or, as here, as a fishery. In any event, there is recognition in the Clean Water Act itself that reduced stream flow, *i. e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. 33 U. S. C. § 1362(19). This broad conception of pollution—one which expressly evinces Congress' concern with the physical and biological integrity of water—refutes petitioners' assertion that the Act draws a sharp distinction between the regulation of water "quantity" and water "quality." Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . . , including changes caused by the construction of dams." 33 U. S. C. § 1314(f). This concern with the flowage effects of dams and other diversions is also embodied in the EPA regulations, which expressly require existing dams to be operated to attain designated uses. 40 CFR § 131.10(g)(4) (1992).

Petitioners assert that two other provisions of the Clean Water Act, §§ 101(g) and 510(2), 33 U. S. C. §§ 1251(g) and 1370(2), exclude the regulation of water quantity from the coverage of the Act. Section 101(g) provides "that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U. S. C. § 1251(g). Similarly, § 510(2) provides that nothing in the Act shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters . . . of such States." 33 U. S. C. § 1370. In petitioners' view, these provisions exclude "water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303." Brief for Petitioners 39 (emphasis deleted).

This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that it prevents the State from regulating stream flow. In any event, we read these provisions more narrowly than petitioners. Sections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation. In *California* v. *FERC,* 495 U. S. 490, 498 (1990), construing an analogous provision of the Federal Power Act,[4] we explained that "minimum stream flow requirements neither reflect nor establish 'proprietary rights'" to water. Cf. *First Iowa Hydro-Electric Cooperative* v. *FPC,* 328 U. S. 152, 176, and n. 20 (1946). Moreover, the certification itself does not purport to determine petitioners' proprietary right to the water of the Dosewallips. In fact, the certification expressly states that a "State Water Right Permit (Chapters 90.03.250 RCW and 508–12 WAC) must be obtained prior to commencing construction of the project." App. to Pet. for Cert. 83a. The certification merely determines the nature of the use to which that proprietary right may be put under the Clean Water Act, if and when it is obtained from the State. Our view is reinforced by the legislative history of the 1977 amendment to the Clean Water Act adding § 101(g). See 3 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 532 (1978) ("The requirements [of the Act] may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations").

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[4] The relevant text of the Federal Power Act provides: "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to

IV

Petitioners contend that we should limit the State's authority to impose minimum flow requirements because FERC has comprehensive authority to license hydroelectric projects pursuant to the FPA, 16 U. S. C. § 791a *et seq.* In petitioners' view, the minimum flow requirement imposed here interferes with FERC's authority under the FPA.

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the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." 41 Stat. 1077, 16 U. S. C. § 821.

The FPA empowers FERC to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." § 797(e). The FPA also requires FERC to consider a project's effect on fish and wildlife. §§ 797(e), 803(a)(1). In *California* v. *FERC, supra,* we held that the California Water Resources Control Board, acting pursuant to state law, could not impose a minimum stream flow which conflicted with minimum stream flows contained in a FERC license. We concluded that the FPA did not "save" to the States this authority. *Id.,* at 498.

No such conflict with any FERC licensing activity is presented here. FERC has not yet acted on petitioners' license application, and it is possible that FERC will eventually deny petitioners' application altogether. Alternatively, it is quite possible, given that FERC is required to give equal consideration to the protection of fish habitat when deciding whether to issue a license, that any FERC license would contain the same conditions as the state § 401 certification. Indeed, at oral argument the Deputy Solicitor General stated that both EPA and FERC were represented in this proceeding, and that the Government has no objection to the stream flow condition contained in the § 401 certification. Tr. of Oral Arg. 43–44.

Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters. For example, a permit from the Army Corps of Engineers is required for the installation of any structure in the navigable waters which may interfere with navigation, including piers, docks, and ramps. Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151, § 10, 33 U. S. C. § 403. Similarly, a permit must be obtained from the Army Corps of Engineers for the discharge of dredged or fill material, and from the Secretary of the Interior or Agriculture for the construction of reservoirs, canals, and other water storage systems on federal land. See 33 U. S. C. §§1344(a), (e); 43 U. S. C. §1761 (1988 ed. and Supp. IV). We assume that a §401 certification would also be required for some licenses obtained pursuant to these statutes. Because §401's certification requirement applies to other statutes and regulatory schemes, and because any conflict with FERC's authority under the FPA is hypothetical, we are unwilling to read implied limitations into §401. If FERC issues a license containing a stream flow condition with which petitioners disagree, they may pursue judicial remedies at that time. Cf. *Escondido Mut. Water Co.* v. *La Jolla Band of Mission Indians*, 466 U. S. 765, 778, n. 20 (1984).

In summary, we hold that the State may include minimum stream flow requirements in a certification issued pursuant to §401 of the Clean Water Act insofar as necessary to enforce a designated use contained in a state water quality standard. The judgment of the Supreme Court of Washington, accordingly, is affirmed.

So ordered.

JUSTICE STEVENS, concurring.

While I agree fully with the thorough analysis in the Court's opinion, I add this comment for emphasis. For judges who find it unnecessary to go behind the statutory text to discern the intent of Congress, this is (or should be) an easy case. Not a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States' ability to impose stricter standards. See, *e. g.*, §301(b)(1)(C), 33 U. S. C. §1311(b)(1)(C).

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

The Court today holds that a State, pursuant to § 401 of the Clean Water Act, may condition the certification necessary to obtain a federal license for a proposed hydroelectric project upon the maintenance of a minimum flow rate in the river to be utilized by the project. In my view, the Court makes three fundamental errors. First, it adopts an interpretation that fails adequately to harmonize the subsections of § 401. Second, it places no meaningful limitation on a State's authority under § 401 to impose conditions on certification. Third, it gives little or no consideration to the fact that its interpretation of § 401 will significantly disrupt the carefully crafted federal-state balance embodied in the Federal Power Act. Accordingly, I dissent.

I

A

Section 401(a)(1) of the Federal Water Pollution Control Act, otherwise known as the Clean Water Act (CWA or Act), 33 U. S. C. § 1251 *et seq.*, provides that "[a]ny applicant for a Federal license or permit to conduct any activity . . . , which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . . that any such discharge will comply with . . . applicable provisions of [the CWA]." 33 U. S. C. § 1341(a)(1). The terms of § 401(a)(1) make clear that the purpose of the certification process is to ensure that discharges from a project will meet the requirements of the CWA. Indeed, a State's authority under § 401(a)(1) is limited to certifying that "any discharge" that "may result" from "any activity," such as petitioners' proposed hydroelectric project, will "comply" with the enumerated provisions of the CWA; if the discharge will fail to comply, the State may "den[y]" the certification. *Ibid.* In addition, under § 401(d), a State may place conditions on a

§401 certification, including "effluent limitations and other limitations, and monitoring requirements," that may be necessary to ensure compliance with various provisions of the CWA and with "any other appropriate requirement of State law." §1341(d).

The minimum stream flow condition imposed by respondents in this case has no relation to any possible "discharge" that might "result" from petitioners' proposed project. The term "discharge" is not defined in the CWA, but its plain and ordinary meaning suggests "a flowing or issuing out," or "something that is emitted." Webster's Ninth New Collegiate Dictionary 360 (1991). Cf. 33 U. S. C. §1362(16) ("The term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants"). A minimum stream flow requirement, by contrast, is a limitation on the amount of water the project can take in or divert from the river. See *ante*, at 709. That is, a minimum stream flow requirement is a limitation on intake—the opposite of discharge. Imposition of such a requirement would thus appear to be beyond a State's authority as it is defined by §401(a)(1).

The Court remarks that this reading of §401(a)(1) would have "considerable force," *ante*, at 711, were it not for what the Court understands to be the expansive terms of §401(d). That subsection, as set forth in 33 U. S. C. §1341(d), provides:

> "Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that *any applicant* for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Fed-

> eral license or permit subject to the provisions of this section." (Emphasis added.)

According to the Court, the fact that § 401(d) refers to an "applicant," rather than a "discharge," complying with various provisions of the Act "contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.'" *Ante,* at 711. In the Court's view, § 401(d)'s reference to an applicant's compliance "expands" a State's authority beyond the limits set out in § 401(a)(1), *ibid.*, thereby permitting the State in its certification process to scrutinize the applicant's proposed "activity as a whole," not just the discharges that may result from the activity, *ante,* at 712. The Court concludes that this broader authority allows a State to impose conditions on a § 401 certification that are unrelated to discharges. *Ante,* at 711–712.

While the Court's interpretation seems plausible at first glance, it ultimately must fail. If, as the Court asserts, § 401(d) permits States to impose conditions unrelated to discharges in § 401 certifications, Congress' careful focus on discharges in § 401(a)(1)—the provision that describes the scope and function of the certification process—was wasted effort. The power to set conditions that are unrelated to discharges is, of course, nothing but a conditional power to deny certification for reasons unrelated to discharges. Permitting States to impose conditions unrelated to discharges, then, effectively eliminates the constraints of § 401(a)(1).

Subsections 401(a)(1) and (d) can easily be reconciled to avoid this problem. To ascertain the nature of the conditions permissible under § 401(d), § 401 must be read as a whole. See *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.,* 484 U. S. 365, 371 (1988) (statutory interpretation is a "holistic endeavor"). As noted above, § 401(a)(1) limits a State's authority in the certification process to addressing concerns related to discharges and to ensuring that any discharge resulting from a project will comply with specified provisions of the Act. It is reasonable to infer that the conditions a State is permitted to impose on certification must relate to the very purpose the certification process is designed to serve. Thus, while § 401(d) permits a State to place conditions on a certification to ensure compliance of the "applicant," those conditions must still be related to discharges. In my view, this interpretation best harmonizes the subsections of § 401. Indeed, any broader interpretation of § 401(d) would permit that subsection to swallow § 401(a)(1).

The text of § 401(d) similarly suggests that the conditions it authorizes must be related to discharges. The Court attaches critical weight to the fact that § 401(d) speaks of the compliance of an "applicant," but that reference, in and of itself, says little about the nature of the conditions that may be imposed under § 401(d). Rather, because § 401(d) conditions can be imposed only to ensure compliance with specified provisions of law—that is, with "applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard[s] of performance under section 1316 of this title, . . . prohibition[s], effluent standard[s], or pretreatment standard[s] under section 1317 of this title, [or] . . . any other appropriate requirement[s] of State law"—one should logically turn to those provisions for guidance in determining the nature, scope, and purpose of § 401(d) conditions. Each of the four identified CWA provisions describes discharge-related limitations. See § 1311 (making it unlawful to discharge any pollutant except in compliance with enumerated provisions of the Act); § 1312 (establishing effluent limitations on point source discharges); § 1316 (setting national standards of performance for the control of discharges); and § 1317 (setting pretreatment effluent standards and prohibiting the discharge of certain effluents except in compliance with standards).

The final term on the list—"appropriate requirement[s] of State law"—appears to be more general in scope. Because this reference follows a list of more limited provisions that specifically address discharges, however, the principle *ejusdem generis* would suggest that the general reference to "appropriate" requirements of state law is most reasonably construed to extend only to provisions that, like the other provisions in the list, impose discharge-related restrictions. Cf. *Cleveland* v. *United States,* 329 U. S. 14, 18 (1946) ("Under the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it"); *Arcadia* v. *Ohio Power Co.,* 498 U. S. 73, 84 (1990). In sum, the text and structure of § 401 indicate that a State may impose under § 401(d) only those conditions that are related to discharges.

B

The Court adopts its expansive reading of § 401(d) based at least in part upon deference to the "conclusion" of the Environmental Protection Agency (EPA) that § 401(d) is not limited to requirements relating to discharges. *Ante,* at 712. The agency regulation to which the Court defers is 40 CFR § 121.2(a)(3) (1993), which provides that the certification shall contain "[a] statement that there is a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." *Ante,* at 712. According to the Court, "EPA's conclusion that *activities*—not merely discharges—must comply with state water quality standards . . . is entitled to deference" under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). *Ante,* at 712.

As a preliminary matter, the Court appears to resort to deference under *Chevron* without establishing through an initial examination of the statute that the text of the section is ambiguous. See *Chevron, supra,* at 842–843. More importantly, the Court invokes *Chevron* deference to support its interpretation even though the Government does not seek deference for the EPA's regulation in this case.[1] That the Government itself has not contended that an agency interpretation exists reconciling the scope of the conditioning authority under § 401(d) with the terms of § 401(a)(1) should suggest to the Court that there is no "agenc[y] construction" directly addressing the question. *Chevron, supra,* at 842.

In fact, the regulation to which the Court defers is hardly a definitive construction of the scope of § 401(d). On the contrary, the EPA's position on the question whether conditions under § 401(d) must be related to discharges is far from clear. Indeed, the only EPA regulation that specifically addresses the "conditions" that may appear in § 401 certifications speaks exclusively in terms of limiting discharges. According to the EPA, a § 401 certification shall contain "[a] statement *of any conditions* which the certifying agency deems necessary or desirable *with respect to the discharge of the activity.*" 40 CFR § 121.2(a)(4) (1993) (emphases added). In my view, § 121.2(a)(4) should, at the very least, give the Court pause before it resorts to *Chevron* deference in this case.

II

The Washington Supreme Court held that the State's water quality standards, promulgated pursuant to § 303 of the Act, 33 U. S. C. § 1313, were "appropriate" requirements of state law under § 401(d), and sustained the stream flow condition imposed by respondents as necessary to ensure compliance with a "use" of the river as specified in those standards. As an alternative to their argument that § 401(d) conditions must be discharge related, petitioners assert that the state court erred when it sustained the stream flow condition under the "use" component of the State's water quality standards without reference to the corresponding "water quality criteria" contained in those standards. As explained above, petitioners' argument with regard to the scope of a State's authority to impose conditions under § 401(d) is correct. I also find petitioners' alternative argument persuasive. Not only does the Court err in rejecting that § 303 argument, in the process of doing so it essentially removes all limitations on a State's conditioning authority under § 401.

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[1] The Government, appearing as *amicus curiae* "supporting affirmance," instead approaches the question presented by assuming, *arguendo,* that petitioners' construction of § 401 is correct: "Even if a condition imposed under Section 401(d) were valid only if it assured that a 'discharge' will comply with the State's water quality standards, the [minimum flow condition set by respondents] satisfies that test." Brief for United States as *Amicus Curiae* 11.

The Court states that, "at a minimum, limitations imposed pursuant to state water quality standards adopted pursuant to § 303 are 'appropriate' requirements of state law" under § 401(d). *Ante,* at 713.[2] A water quality standard promulgated pursuant to § 303 must "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U. S. C. § 1313(c)(2)(A). The Court asserts that this language "is most naturally read to require that a project be consistent with *both* components, namely, the designated use *and* the water quality criteria." *Ante,* at 715. In the Court's view, then, the "use" of a body of water is independently enforceable through § 401(d) without reference to the corresponding criteria. *Ibid.*

The Court's reading strikes me as contrary to common sense. It is difficult to see how compliance with a "use" of a body of water could be enforced without reference to the corresponding criteria. In this case, for example, the applicable "use" is contained in the following regulation: "Characteristic uses shall include, but not be limited to, . . . [s]almonid migration, rearing, spawning, and harvesting." Wash. Admin. Code (WAC) 173–201–045(1)(b)(iii) (1986). The corresponding criteria, by contrast, include measurable factors such as quantities of fecal coliform organisms and dissolved gases in the water. 173–201–045(1)(c)(i) and (ii).[3] Although the Act does not further address (at least not expressly) the link between "uses" and "criteria," the regulations promulgated under § 303 make clear that a "use" is an aspirational goal to be attained through compliance with corresponding "criteria." Those regulations suggest that "uses" are to be "achieved and protected," and that "water quality criteria" are to be adopted to "protect the designated use[s]." 40 CFR §§ 131.10(a), 131.11(a)(1) (1993).

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[2] In the Court's view, § 303 water quality standards come into play under § 401(d) either as "appropriate" requirements of state law or through § 301 of the Act, which, according to the Court, "incorporates § 303 by reference." *Ante,* at 713 (citations omitted). The Court notes that through § 303, "the statute allows States to impose limitations to ensure compliance with § 301 of the Act." *Ibid.* Yet § 301 makes unlawful only "the [unauthorized] *discharge* of any pollutant by any person." 33 U. S. C. § 1311(a) (emphasis added); cf. *supra,* at 727. Thus, the Court's reliance on § 301 as a source of authority to impose conditions unrelated to discharges is misplaced.

The problematic consequences of decoupling "uses" and "criteria" become clear once the Court's interpretation of § 303 is read in the context of § 401. In the Court's view, a State may condition the § 401 certification "upon *any limitations* necessary to ensure compliance" with the "uses of the water body." *Ante*, at 713–714, 715 (emphasis added). Under the Court's interpretation, then, state environmental agencies may pursue, through § 401, their water goals in any way they choose; the conditions imposed on certifications need not relate to discharges, nor to water quality criteria, nor to any objective or quantifiable standard, so long as they tend to make the water more suitable for the uses the State has chosen. In short, once a State is allowed to impose conditions on § 401 certifications to protect "uses" in the abstract, § 401(d) is limitless.

To illustrate, while respondents in this case focused only on the "use" of the Dosewallips River as a fish habitat, this particular river has a number of other "[c]haracteristic uses," including "[r]ecreation (primary contact recreation, sport fishing, boating, and aesthetic enjoyment)." WAC 173-201-045(1)(b)(v) (1986). Under the Court's interpretation, respondents could have imposed any number of conditions related to recreation, including conditions that have little relation to water quality. In *Town of Summersville,* 60 FERC ¶61,291, p. 61,990 (1992), for instance, the state agency required the applicant to "construct . . . access roads and paths, low water stepping stone bridges, . . . a boat launching facility . . . , and a residence and storage building." These conditions presumably would be sustained under the approach the Court adopts today.[4] In the end, it is difficult to conceive of a condition that would fall outside a State's §401(d) authority under the Court's approach.

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[3] Respondents concede that petitioners' project "will likely not violate any of Washington's water quality criteria." Brief for Respondents 24.

III

The Court's interpretation of §401 significantly disrupts the careful balance between state and federal interests that Congress struck in the Federal Power Act (FPA), 16 U. S. C. §791 *et seq.* Section 4(e) of the FPA authorizes the Federal Energy Regulatory Commission (FERC) to issue licenses for projects "necessary or convenient . . . for the development, transmission, and utilization of power across, along, from, or in any of the streams . . . over which Congress has jurisdiction." 16 U. S. C. §797(e). In the licensing process, FERC must balance a number of considerations: "[I]n addition to the power and development purposes for which licenses are issued, [FERC] shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Ibid.* Section 10(a) empowers FERC to impose on a license such conditions, including minimum stream flow requirements, as it deems best suited for power development and other public uses of the waters. See 16 U. S. C. § 803(a); *California* v. *FERC*, 495 U. S. 490, 494–495, 506 (1990).

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[4] Indeed, as the §401 certification stated in this case, the flow levels imposed by respondents are "in excess of those required to maintain water quality in the bypass region," App. to Pet. for Cert. 83a, and therefore conditions not related to water quality must, in the Court's view, be permitted.

In *California* v. *FERC*, the Court emphasized FERC's exclusive authority to set the stream flow levels to be maintained by federally licensed hydroelectric projects. California, in order "to protect [a] stream's fish," had imposed flow rates on a federally licensed project that were significantly higher than the flow rates established by FERC. *Id.*, at 493. In concluding that California lacked authority to impose such flow rates, we stated:

> "As Congress directed in FPA § 10(a), FERC set the conditions of the [project] license, including the minimum stream flow, after considering which requirements would best protect wildlife and ensure that the project would be economically feasible, and thus further power development. Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by FERC." *Id.*, at 506–507 (citations and internal quotation marks omitted).

California v. *FERC* reaffirmed our decision in *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U. S. 152, 164 (1946), in which we warned against "vest[ing] in [state authorities] a veto power" over federal hydroelectric projects. Such authority, we concluded, could "destroy the effectiveness" of the FPA and "subordinate to the control of the State the 'comprehensive' planning" with which the administering federal agency (at that time the Federal Power Commission) was charged. *Ibid.*

Today, the Court gives the States precisely the veto power over hydroelectric projects that we determined in *California* v. *FERC* and *First Iowa* they did not possess. As the language of § 401(d) expressly states, any condition placed in a § 401 certification, including, in the Court's view, a stream flow requirement, "*shall* become a condition on any Federal license or permit." 33 U. S. C. § 1341(d) (emphasis added). Any condition imposed by a State under § 401(d) thus becomes a "ter[m] . . . of the license as a matter of law," *Department of Interior* v. *FERC,* 952 F. 2d 538, 548 (CADC 1992) (citation and internal quotation marks omitted), regardless of whether FERC favors the limitation. Because of § 401(d)'s mandatory language, federal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court.[5] Section 401(d) conditions imposed by States are therefore binding on FERC. Under the Court's interpretation, then, it appears that the mistake of the State in *California* v. *FERC* was not that it had trespassed into territory exclusively reserved to FERC; rather, it simply had not hit upon the proper device—that is, the § 401 certification—through which to achieve its objectives.

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[5] See, *e. g., Keating* v. *FERC,* 927 F. 2d 616, 622 (CADC 1991) (federal review inappropriate because a decision to grant or deny § 401 certification "presumably turns on questions of substantive state environmental law—an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence"); *Department of Interior* v. *FERC,* 952 F. 2d, at 548; *United States* v. *Marathon Development Corp.,* 867 F. 2d 96, 102 (CA1 1989); *Proffitt* v. *Rohm & Haas,* 850 F. 2d 1007, 1009 (CA3 1988). FERC has taken a similar position. See *Town of Summersville,* 60 FERC ¶ 61,291, p. 61,990 (1992) ("[S]ince pursuant to Section 401(d) . . . all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission. The only alternatives available to the Commission are either to issue a license with the conditions included or to deny" the application altogether); accord, *Central Maine Power Co.,* 52 FERC ¶ 61,033, pp. 61,172–61,173 (1990).

Although the Court notes in passing that "[t]he limitations included in the certification become a condition on any federal license," *ante*, at 708, it does not acknowledge or discuss the shift of power from FERC to the States that is accomplished by its decision. Indeed, the Court merely notes that "any conflict with FERC's authority under the FPA" in this case is "hypothetical" at this stage, *ante*, at 723, because "FERC has not yet acted on petitioners' license application," *ante*, at 722. We are assured that "it is quite possible . . . that any FERC license would contain the same conditions as the state § 401 certification." *Ibid.*

The Court's observations simply miss the point. Even if FERC might have no objection to the stream flow condition established by respondents *in this case*, such a happy coincidence will likely prove to be the exception, rather than the rule. In issuing licenses, FERC must balance the *Nation's* power needs together with the need for energy conservation, irrigation, flood control, fish and wildlife protection, and recreation. 16 U. S. C. § 797(e). State environmental agencies, by contrast, need only consider parochial environmental interests. Cf., *e. g.*, Wash. Rev. Code § 90.54.010(2) (1992) (goal of State's water policy is to "insure that waters of the state are protected and fully utilized for the greatest benefit to the people of the state of Washington"). As a result, it is likely that conflicts will arise between a FERC-established stream flow level and a state-imposed level.

Moreover, the Court ignores the fact that its decision nullifies the congressionally mandated process for resolving such state-federal disputes when they develop. Section 10(j)(1) of the FPA, 16 U. S. C. § 803(j)(1), which was added as part of the Electric Consumers Protection Act of 1986 (ECPA), 100 Stat. 1244, provides that every FERC license must include conditions to "protect, mitigate damag[e] to, and enhance" fish and wildlife, including "related spawning grounds and habitat," and that such conditions "shall be based on recommendations" received from various agencies, including state fish and wildlife agencies. If FERC believes that a recommendation from a state agency is inconsistent with the FPA—that is, inconsistent with what FERC views as the proper balance between the Nation's power needs and environmental concerns—it must "attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities" of the state agency. § 803(j)(2). If, after such an attempt, FERC "does not adopt in whole or in part a recommendation of any [state] agency," it must publish its reasons for rejecting that recommendation. *Ibid.* After today's decision, these procedures are a dead letter with regard to stream flow levels, because a State's "recommendation" concerning stream flow "shall" be included in the license when it is imposed as a condition under § 401(d).

More fundamentally, the 1986 amendments to the FPA simply make no sense in the stream flow context if, in fact, the States already possessed the authority to establish minimum stream flow levels under § 401(d) of the CWA, which was enacted years before those amendments. Through the ECPA, Congress strengthened the role of the States in establishing FERC conditions, but it did not make that authority paramount. Indeed, although Congress could have vested in the States the final authority to set stream flow conditions, it instead left that authority with FERC. See *California* v. *FERC,* 495 U. S., at 499. As the Ninth Circuit observed in the course of rejecting California's effort to give *California* v. *FERC* a narrow reading, "[t]here would be no point in Congress requiring [FERC] to consider the state agency recommendations on environmental matters and make its own decisions about which to accept, if the state agencies had the power to impose the requirements themselves." *Sayles Hydro Associates* v. *Maughan*, 985 F. 2d 451, 456 (1993).

Given the connection between § 401 and federal hydroelectric licensing, it is remarkable that the Court does not at least attempt to fit its interpretation of § 401 into the larger statutory framework governing the licensing process. At the very least, the significant impact the Court's ruling is likely to have on that process should compel the Court to undertake a closer examination of § 401 to ensure that the result it reaches was mandated by Congress.

IV

Because the Court today fundamentally alters the federal-state balance Congress carefully crafted in the FPA, and because such a result is neither mandated nor supported by the text of § 401, I respectfully dissent.

NICHOLS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 92–8556. Argued January 10, 1994—Decided June 6, 1994

After petitioner Nichols pleaded guilty to federal felony drug charges, he was assessed criminal history points under the United States Sentencing Guidelines, including one point for a state misdemeanor conviction for driving while under the influence (DUI), for which he was fined but not incarcerated. That point increased the maximum sentence of imprisonment from 210 to 235 months. Petitioner objected to the inclusion of his DUI conviction, arguing that because he had not been represented by counsel in that proceeding, considering it in establishing his sentence would violate the Sixth Amendment as construed in *Baldasar* v. *Illinois,* 446 U. S. 222. However, the District Court reasoned that *Baldasar* lacked a majority opinion and thus stood only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term. Since petitioner's offense was already defined as a felony, the court ruled that *Baldasar* was inapplicable and sentenced petitioner to a term of imprisonment 25 months longer than it could have been had the DUI conviction not been considered. The Court of Appeals affirmed.

Held: Consistent with the Sixth and Fourteenth Amendments, a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense so long as the previous uncounseled misdemeanor conviction did not result in a sentence of imprisonment. Pp. 743–749.

(a) A year after this Court decided that a defendant charged with a misdemeanor has no constitutional right to counsel where no sentence of imprisonment is imposed, *Scott* v. *Illinois,* 440 U. S. 367, a majority of the Court held in *Baldasar* that a prior uncounseled misdemeanor conviction, constitutional under *Scott,* could not be collaterally used to convert a second misdemeanor conviction into a felony under the applicable Illinois sentencing enhancement statute. However, that *per curiam* opinion provided no rationale for its result, referring instead to three different concurring opinions to support the judgment. This splintered decision has created great confusion in the lower courts. Pp. 743–746.

(b) Five Members of the *Baldasar* Court expressed continued adherence to *Scott.* This Court adheres to that holding today, but agrees with the dissent in *Baldasar* that a logical consequence of the holding is that an uncounseled conviction valid under *Scott* may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes do not change the penalty imposed for the earlier conviction. Reliance on the earlier conviction is also consistent with the traditional understanding of the sentencing process, which is less exacting than the process of establishing guilt. It is constitutional to consider a defendant's past criminal conduct when sentencing, even if no conviction resulted from that behavior, and the state need prove such conduct only by a preponderance of the evidence. *McMillan* v. *Pennsylvania,* 477 U. S. 79, 91. Thus, it must be constitutionally permissible to consider a prior misdemeanor conviction based on the same conduct where that conduct is subject to proof beyond a reasonable doubt. Petitioner's due process contention that a misdemeanor defendant must be warned that his conviction might be used in the future for enhancement purposes is rejected. Such convictions often take place in police or justice courts, which are not courts of record, and thus there may be no way to memorialize any such warning; and it is unclear how expansive the warning would have to be. Pp. 746–749.

979 F. 2d 402, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. SOUTER, J., filed an opinion concurring in the judgment, *post,* p. 749. BLACKMUN, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 754. GINSBURG, J., filed a dissenting opinion, *post,* p. 765.

William B. Mitchell Carter, by appointment of the Court, 510 U. S. 942, argued the cause for petitioner. With him on the briefs was *Mary Julia Foreman.*

Deputy Solicitor General Bryson argued the cause for the United States. With him on the brief were *Solicitor General Days, Assistant Attorney General Harris, Michael R. Dreeben,* and *Thomas E. Booth.**

**Susan N. Herman* and *Steven R. Shapiro* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Kent S. Scheidegger and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we return to the issue that splintered the Court in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980): Whether the Constitution prohibits a sentencing court from considering a defendant's previous uncounseled misdemeanor conviction in sentencing him for a subsequent offense.

In 1990, petitioner Nichols pleaded guilty to conspiracy to possess cocaine with intent to distribute, in violation of 21 U. S. C. §846. Pursuant to the United States Sentencing Commission's Guidelines (Sentencing Guidelines), petitioner was assessed three criminal history points for a 1983 federal felony drug conviction. An additional criminal history point was assessed for petitioner's 1983 state misdemeanor conviction for driving under the influence (DUI), for which petitioner was fined $250 but was not incarcerated.[1] This additional criminal history point increased petitioner's Criminal History Category from Category II to Category III.[2] As a result, petitioner's sentencing range under the Sentencing Guidelines increased from 168–210 months (under Criminal History Category II) to 188–235 months (under Category III).[3]

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[1] At the time of his conviction, petitioner faced a maximum punishment of one year imprisonment and a $1,000 fine. Georgia law provided that a person convicted of driving under the influence of alcohol "shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not less than ten days nor more than one year, or by a fine of not less than $100.00 nor more than $1,000.00, or by both such fine and imprisonment." Ga. Code Ann. §40.6–391(c) (1982).

[2] There are six criminal history categories under the Sentencing Guidelines. United States Sentencing Commission, Guidelines Manual (USSG) ch. 5, pt. A (Nov. 1993) (Sentencing Table). A defendant's criminal history category is determined by the number of his criminal history points, which in turn is based on his prior criminal record. *Id.*, ch. 4, p. A.

[3] The Sentencing Table provides a matrix of sentencing ranges. On the vertical axis of the matrix is the defendant's offense level representing the seriousness of the crime; on the horizontal axis is the defendant's criminal history category. The sentencing range is determined by identifying the

Petitioner objected to the inclusion of his DUI misdemeanor conviction in his criminal history score because he was not represented by counsel at that proceeding. He maintained that consideration of that uncounseled misdemeanor conviction in establishing his sentence would violate the Sixth Amendment as construed in *Baldasar, supra.* The United States District Court for the Eastern District of Tennessee found that petitioner's misdemeanor conviction was uncounseled and that, based on the record before it, petitioner had not waived his right to counsel.[4] 763 F. Supp. 277 (1991). But the District Court rejected petitioner's *Baldasar* argument, explaining that in the absence of a majority opinion, *Baldasar* "stands only for the proposition that a prior uncounseled misdemeanor conviction may not be used to create a felony with a prison term." 763 F. Supp., at 279. Because petitioner's offense was already defined as a felony, the District Court ruled that *Baldasar* was inapplicable to the facts of this case; thus, petitioner's constitutional rights were not violated by using his 1983 DUI conviction to enhance his sentence.[5] It sentenced petitioner to the maximum term allowed by the Sentencing Guidelines under its interpretation of *Baldasar,* a term 25 months longer than if the misdemeanor conviction had not been considered in calculating petitioner's criminal history score.

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intersection of the defendant's offense level and his criminal history category. *Id.,* ch. 5, pt. A (Sentencing Table).

[4] The Government contends that, even if *Baldasar* v. *Illinois,* 446 U. S. 222 (1980), prohibits using the prior uncounseled misdemeanor conviction to enhance petitioner's sentence, the District Court applied the wrong legal standard in finding no valid waiver of the right to counsel. Based on *Johnson* v. *Zerbst,* 304 U. S. 458, 467–469 (1938), and *Parke* v. *Raley,* 506 U. S. 20, 28–29 (1992), the Government argues that petitioner failed to carry his burden to establish the absence of a valid waiver of counsel. We need not address this contention due to our resolution of the *Baldasar* issue.

[5] Petitioner's instant felony conviction was punishable under statute by not less than 10 years' imprisonment and not more than life imprisonment. See 21 U. S. C. § 841(b)(1)(B); 979 F. 2d 402, 413–414, 417–418 (CA6 1992).

A divided panel of the Court of Appeals for the Sixth Circuit affirmed. 979 F. 2d 402 (1992). After reviewing the fractured decision in *Baldasar* and the opinions from other Courts of Appeals that had considered the issue, the court held that *Baldasar* limits the collateral use at sentencing of a prior uncounseled misdemeanor conviction only when the effect of such consideration is to convert a misdemeanor into a felony.[6] The dissent, while recognizing that "numerous courts have questioned whether *[Baldasar]* expresses *any* single holding, and, accordingly, have largely limited *Baldasar* to its facts," nevertheless concluded that *Baldasar* proscribed the use of petitioner's prior uncounseled DUI conviction to enhance his sentence under the Sentencing Guidelines. 979 F. 2d, at 407–408 (citations omitted).

We granted certiorari, 509 U. S. 953 (1993), to address this important question of Sixth Amendment law, and to thereby resolve a conflict among state courts[7] as well as Federal Courts of Appeals.[8] We now affirm.

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[6] The court also stated that its decision was "logically compelled" by *Charles* v. *Foltz*, 741 F. 2d 834, 837 (CA6 1984), cert. denied, 469 U. S. 1193 (1985), 979 F. 2d, at 415–416, 418 ("'[E]vidence of prior uncounselled misdemeanor convictions for which imprisonment was not imposed . . . may be used for impeachment purposes'").

[7] Cf. *Lovell* v. *State*, 283 Ark. 425, 428, 678 S. W. 2d 318, 320 (1984) (*Baldasar* bars any prior uncounseled misdemeanor conviction from enhancing a term of imprisonment following a second conviction); *State* v. *Vares*, 71 Haw. 617, 620, 801 P. 2d 555, 557 (1990) (same); *State* v. *Laurick*, 120 N. J. 1, 16, 575 A. 2d 1340, 1347 (*Baldasar* bars an enhanced penalty only when it is greater than that authorized in the absence of the prior offense or converts a misdemeanor into a felony), cert. denied, 498 U. S. 967 (1990); *Hlad* v. *State*, 565 So. 2d 762, 764–766 (Fla. App. 1990) (following the approach of JUSTICE BLACKMUN, thereby limiting enhancement to situations where the prior uncounseled misdemeanor was punishable by six months' imprisonment or less), aff'd, 585 So. 2d 928, 930 (Fla. 1991); *Sheffield* v. *Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990) (*Baldasar* establishes no barrier to the collateral use of valid, uncounseled misdemeanor convictions).

[8] The Sixth Circuit expressly joined the Fifth and Second Circuits in essentially limiting *Baldasar* to its facts. See *Wilson* v. *Estelle*, 625 F. 2d 1158, 1159, and n. 1 (CA5 1980) (a prior uncounseled misdemeanor convic-

In *Scott* v. *Illinois,* 440 U. S. 367 (1979), we held that where no sentence of imprisonment was imposed, a defendant charged with a misdemeanor had no constitutional right to counsel.[9] Our decision in *Scott* was dictated by *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), but we stated that "[e]ven were the matter *res nova,* we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Scott, supra,* at 373.

One year later, in *Baldasar* v. *Illinois,* 446 U. S. 222 (1980), a majority of the Court held that a prior uncounseled misdemeanor conviction, constitutional under *Scott,* could nevertheless *not* be collaterally used to convert a second misdemeanor conviction into a felony under the applicable Illinois sentencing enhancement statute. The *per curiam* opinion in *Baldasar* provided no rationale for the result; instead, it referred to the "reasons stated in the concurring opinions."

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tion cannot be used under a sentence enhancement statute to convert a subsequent misdemeanor into a felony with a prison term), cert. denied, 451 U. S. 912 (1981); *United States* v. *Castro-Vega,* 945 F. 2d 496, 500 (CA2 1991) (*Baldasar* does not apply where "the court used an uncounseled misdemeanor conviction to determine the appropriate criminal history category for a crime that was already a felony"), cert. denied *sub nom. Cintron-Rodriguez* v. *United States,* 507 U. S. 908 (1992). But see, *e. g., United States* v. *Brady,* 928 F. 2d 844, 854 (CA9 1991) (*Baldasar* and the Sixth Amendment bar any imprisonment in a subsequent case imposed because of an uncounseled conviction in which the right to counsel was not waived).

[9] In felony cases, in contrast to misdemeanor charges, the Constitution requires that an indigent defendant be offered appointed counsel unless that right is intelligently and competently waived. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). We have held that convictions gained in violation of *Gideon* cannot be used "either to support guilt or enhance punishment for another offense," *Burgett* v. *Texas,* 389 U. S. 109, 115 (1967), and that a subsequent sentence that was based in part on a prior invalid conviction must be set aside, *United States* v. *Tucker,* 404 U. S. 443, 447–449 (1972).

446 U. S., at 224. There were three different opinions supporting the result. Justice Stewart, who was joined by JUSTICES Brennan and STEVENS, stated simply that the defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense," and that "this prison sentence violated the constitutional rule of *Scott* . . . ." *Ibid.* Justice Marshall, who was also joined by JUSTICES Brennan and STEVENS, rested his opinion on the proposition that an uncounseled misdemeanor conviction is "not sufficiently reliable" to support imprisonment under *Argersinger*, and that it "does not become more reliable merely because the accused has been validly convicted of a subsequent offense." 446 U. S., at 227–228. JUSTICE BLACKMUN, who provided the fifth vote, advanced the same rationale expressed in his dissent in *Scott*—that the Constitution requires appointment of counsel for an indigent defendant whenever he is charged with a "nonpetty" offense (an offense punishable by more than six months' imprisonment) or when the defendant is actually sentenced to imprisonment. 446 U. S., at 229–230. Under this rationale, Baldasar's prior misdemeanor conviction was invalid and could not be used for enhancement purposes because the initial misdemeanor was punishable by a prison term of more than six months.

Justice Powell authored the dissent, in which the remaining three Members of the Court joined. The dissent criticized the majority's holding as one that "undermines the rationale of *Scott* and *Argersinger* and leaves no coherent rationale in its place." *Id.*, at 231. The dissent opined that the majority's result misapprehended the nature of enhancement statutes that "do not alter or enlarge a prior sentence," ignored the significance of the constitutional validity of the first conviction under *Scott*, and created a "hybrid" conviction, good for the punishment actually imposed but not available for sentence enhancement in a later prosecution.

446 U. S., at 232–233. Finally—and quite presciently—the dissent predicted that the Court's decision would create confusion in the lower courts. *Id.*, at 234.

In *Marks* v. *United States*, 430 U. S. 188 (1977), we stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Id.*, at 193, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976). This test is more easily stated than applied to the various opinions supporting the result in *Baldasar.* A number of Courts of Appeals have decided that there is no lowest common denominator or "narrowest grounds" that represents the Court's holding. See, *e. g., United States* v. *Castro-Vega*, 945 F. 2d 496, 499–500 (CA2 1991); *United States* v. *Eckford*, 910 F. 2d 216, 219, n. 8 (CA5 1990); *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 345 (CA7 1983), cert. denied, 465 U. S. 1068 (1984). Another Court of Appeals has concluded that the holding in *Baldasar* is JUSTICE BLACKMUN's rationale, *Santillanes* v. *United States Parole Comm'n*, 754 F. 2d 887, 889 (CA10 1985); yet another has concluded that the "consensus" of the *Baldasar* concurrences is roughly that expressed by Justice Marshall's concurring opinion. *United States* v. *Williams*, 891 F. 2d 212, 214 (CA9 1989). State courts have similarly divided.[10] The Sentencing Guidelines have also reflected uncertainty over *Baldasar.*[11] We think it not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it. This degree of confusion following a splintered decision such as *Baldasar* is itself a reason for reexamining that decision. *Payne* v. *Tennessee,* 501 U. S. 808, 829–830 (1991); *Miller* v. *California,* 413 U. S. 15, 24–25 (1973).

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[10] See n. 7, *supra.*

[11] The 1989 version of the Sentencing Guidelines stated that, in determining a defendant's criminal history score, an uncounseled misdemeanor conviction should be excluded only if it "would result in the imposition of a sentence of imprisonment under circumstances that would violate the United States Constitution." USSG §4A1.2, Application Note 6 (Nov. 1989). Effective November 1, 1990, the Sentencing Commission amended §4A1.2 by deleting the above quoted phrase and adding the following statement as background commentary: "Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncoun-

Five Members of the Court in *Baldasar*—the four dissenters and Justice Stewart—expressed continued adherence to *Scott* v. *Illinois,* 440 U. S. 367 (1979). There the defendant was convicted of shoplifting under a criminal statute which provided that the penalty for the offense should be a fine of not more than $500, a term of not more than one year in jail, or both. The defendant was in fact fined $50, but he contended that since imprisonment for the offense was authorized by statute, the Sixth and Fourteenth Amendments to the United States Constitution required Illinois to provide trial counsel. We rejected that contention, holding that so long as no imprisonment was actually imposed, the Sixth Amendment right to counsel did not obtain. *Id.,* at 373–374. We reasoned that the Court, in a number of decisions, had already expanded the language of the Sixth Amendment well beyond its obvious meaning, and that the line should be drawn between criminal proceedings that resulted in imprisonment, and those that did not. *Id.,* at 372.

We adhere to that holding today, but agree with the dissent in *Baldasar* that a logical consequence of the holding is that an uncounseled conviction valid under *Scott* may be re-

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seled misdemeanor sentences where imprisonment was not imposed." USSG App. C, amdt. 353 (Nov. 1993). When the Sentencing Commission initially published the amendment for notice and comment, it included the following explanation: "The Commission does not believe the inclusion of sentences resulting from constitutionally valid, uncounseled misdemeanor convictions in the criminal history score is foreclosed by Baldasar v. Illinois, 446 U. S. 222 (1980)." 55 Fed. Reg. 5741 (1990).

lied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment. Enhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes that are commonplace in state criminal laws, do not change the penalty imposed for the earlier conviction. As pointed out in the dissenting opinion in *Baldasar*, "[t]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant. *E. g., Moore* v. *Missouri*, 159 U. S. 673, 677 (1895); *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962)." 446 U. S., at 232.

Reliance on such a conviction is also consistent with the traditional understanding of the sentencing process, which we have often recognized as less exacting than the process of establishing guilt. As a general proposition, a sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U. S. 443, 446 (1972). "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." *Wisconsin* v. *Mitchell*, 508 U. S. 476, 485 (1993). One such important factor, as recognized by state recidivism statutes and the criminal history component of the Sentencing Guidelines, is a defendant's prior convictions. Sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior. We have upheld the constitutionality of considering such previous conduct in *Williams* v. *New York*, 337 U. S. 241 (1949). We have also upheld the consideration of such conduct, in connection with the offense presently charged, in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986). There we held that the state could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty.

Thus, consistently with due process, petitioner in the present case could have been sentenced more severely based simply on evidence of the underlying conduct that gave rise to the previous DUI offense. And the state need prove such conduct only by a preponderance of the evidence. *Id.*, at 91. Surely, then, it must be constitutionally permissible to consider a prior uncounseled misdemeanor conviction based on the same conduct where that conduct must be proved beyond a reasonable doubt.

Petitioner contends that, at a minimum, due process requires a misdemeanor defendant to be warned that his conviction might be used for enhancement purposes should the defendant later be convicted of another crime. No such requirement was suggested in *Scott*, and we believe with good reason. In the first place, a large number of misdemeanor convictions take place in police or justice courts which are not courts of record. Without a drastic change in the procedures of these courts, there would be no way to memorialize any such warning. Nor is it at all clear exactly how expansive the warning would have to be; would a Georgia court have to warn the defendant about permutations and commutations of recidivist statutes in 49 other States, as well as the criminal history provision of the Sentencing Guidelines applicable in federal courts? And a warning at the completely general level—that if he is brought back into court on another criminal charge, a defendant such as Nichols will be treated more harshly—would merely tell him what he must surely already know.

Today we adhere to *Scott* v. *Illinois*, *supra*, and overrule *Baldasar*.[12] Accordingly we hold, consistent with the Sixth and Fourteenth Amendments of the Constitution, that an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.

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[12] Of course States may decide, based on their own constitutions or public policy, that counsel should be available for all indigent defendants charged with misdemeanors. Indeed, many, if not a majority, of States

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE SOUTER, concurring in the judgment.

I write separately because I do not share the Court's view that *Baldasar* v. *Illinois*, 446 U. S. 222 (1980), has a holding that can be "overrule[d]," *ante*, at 748, and because I wish to be clear about the narrow ground on which I think this case is properly decided. *Baldasar* is an unusual case, not because no single opinion enlisted a majority, but because no common ground united any five Justices. As I read the various opinions, eight Members of the *Baldasar* Court divided, four to four, over whether an uncounseled misdemeanor conviction that is valid because no prison sentence was imposed, see *Scott* v. *Illinois*, 440 U. S. 367 (1979), may be used for automatic enhancement of the prison sentence attached to a subsequent conviction. See *Baldasar*, 446 U. S., at 224 (Stewart, J., joined by Brennan and STEVENS, JJ., concurring); *id.*, at 224–229 (Marshall, J., joined by Brennan and STEVENS, JJ., concurring); *id.*, at 230–235 (Powell, J., joined by Burger, C. J., and White and REHNQUIST, JJ., dissenting).

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guarantee the right to counsel whenever imprisonment is authorized by statute, rather than actually imposed. See, *e. g.*, Alaska Stat. Ann. §18.85.100 (1991) ("serious" crime means any crime where imprisonment authorized); Ariz. Rule Crim. Proc. 6.1(b) (indigent defendant shall be entitled to have attorney appointed in any criminal proceeding that may result in punishment by loss of liberty, or where court concludes that appointment satisfies the ends of justice); Cal. Penal Code Ann. §15 (West 1988), Cal. Penal Code Ann. §858 (West 1985); *Brunson* v. *State*, 182 Ind. App. 146, 394 N. E. 2d 229 (1979) (right to counsel in misdemeanor proceedings guaranteed by Ind. Const., Art. I, §13); N. H. Rev. Stat. Ann. §604–A:2 (1986 and Supp. 1992).

Instead of breaking the tie, the ninth Justice, JUSTICE BLACKMUN, declined to accept the premise on which the others proceeded (that the prior uncounseled conviction was valid under *Scott*), adhering to his earlier position that an uncounseled conviction of the sort involved in *Baldasar* was not valid for any purpose. See 446 U. S., at 229–230 (BLACKMUN, J., concurring) (discussing *Scott, supra,* at 389–390 (BLACKMUN, J., dissenting)). Significantly for present purposes, JUSTICE BLACKMUN gave no indication of his view on whether an uncounseled conviction, if valid under *Scott,* could subsequently be used for automatic sentence enhancement. On the question addressed by the other eight Justices, then, the *Baldasar* Court was in equipoise, leaving a decision in the same posture as an affirmance by an equally divided Court, entitled to no precedential value, see *United States* v. *Pink,* 315 U. S. 203, 216 (1942). Cf. *Waters* v. *Churchill, ante,* p. 661; *ante,* at 685 (SOUTER, J., concurring); *Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Mass.,* 383 U. S. 413 (1966) (discussed in *Marks* v. *United States,* 430 U. S. 188, 193–194 (1977)).

Setting *Baldasar* aside as controlling precedent (but retaining the case's even split as evidence), it seems safe to say that the question debated there is a difficult one. The Court in *Scott,* relying on *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972), drew a bright line between imprisonment and lesser criminal penalties, on the theory, as I understand it, that the concern over reliability raised by the absence of counsel is tolerable when a defendant does not face the deprivation of his liberty. See *Scott, supra,* at 372–373; see also *Argersinger, supra,* at 34–37 (discussing studies showing that "the volume of misdemeanor cases . . . may create an obsession for speedy dispositions, regardless of the fairness of the result") (footnote omitted). There is an obvious and serious argument that the line drawn in *Scott* is crossed when, as Justice

Stewart put it in *Baldasar*, a defendant is "sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." 446 U. S., at 224 (concurring opinion) (emphasis in original); see also *id.*, at 227 (Marshall, J., concurring) (petitioner's prison sentence "was imposed as a direct consequence of [the previous] uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*").

Fortunately, the difficult constitutional question that argument raises need not be answered in deciding this case, cf. *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring), for unlike the sentence-enhancement scheme involved in *Baldasar*, the United States Sentencing Commission's Guidelines (Guidelines) do not provide for automatic enhancement based on prior uncounseled convictions. Prior convictions, as the Court explains, serve under the Guidelines to place the defendant in one of six "criminal history" categories; the greater the number of prior convictions, the higher the category. See *ante*, at 740, and n. 2. But the Guidelines seek to punish those who exhibit a pattern of "criminal conduct," not a pattern of prior convictions as such, see United States Sentencing Commission, Guidelines Manual (USSG) ch. 4, pt. A (Nov. 1993) (intro. comment.), and accordingly do not bind a district court to the category into which simple addition places the defendant. Thus, while the Guidelines require that "uncounseled misdemeanor sentences where imprisonment was not imposed" are "to be counted in the criminal history score," USSG App. C, amdt. 353 (Nov. 1993), they also expressly empower the district court to depart from the range of sentences prescribed for a criminal-history category that inaccurately captures the defendant's actual history of criminal conduct. See *id.*, § 4A1.3. In particular, the Guidelines authorize downward departure "where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." *Ibid.**

Under the Guidelines, then, the role prior convictions play in sentencing is presumptive, not conclusive, and a defendant has the chance to convince the sentencing court of the unreliability of any prior valid but uncounseled convictions in reflecting the seriousness of his past criminal conduct or predicting the likelihood of recidivism. A defendant may show, for example, that his prior conviction resulted from railroading an unsophisticated indigent, from a frugal preference for a low fine with no counsel fee, or from a desire to put the matter behind him instead of investing the time to fight the charges.

Because the Guidelines allow a defendant to rebut the negative implication to which a prior uncounseled conviction gives rise, they do not ignore the risk of unreliability associated with such a conviction. Moreover, as the Court observes, permitting a court to consider (in contrast to giving conclusive weight to) a prior uncounseled conviction is "consistent with the traditional understanding of the sentencing process," under which a "judge 'may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come,'" at least as long as the defendant is given a reasonable opportunity to disprove the accuracy of information on which the judge may rely, and to contest the relevancy of that information to sentencing. *Ante,* at 747 (quoting *United States* v. *Tucker,* 404 U. S. 443, 446 (1972)). Where concern for reliability is accommodated, as it is under the Guidelines, nothing in the Sixth Amendment or our cases requires a sentencing court to ignore the fact of a valid uncounseled conviction, even if that conviction is a less confident indicator of guilt than a counseled one would be. Cf. United States Sentencing Commission, Sentencing Guidelines for United States Courts, 55 Fed. Reg. 5741 (1990) (explaining that valid, uncounseled convictions should be counted in determining a defendant's criminal history category because the alternative would "deprive the [sentencing] court of significant information relevant to the purposes of sentencing").

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*"Congress gave the Sentencing Commission authority to 'maintai[n] sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.' 28 U. S. C. § 991(b)(1)(B). The Commission used this authority in adopting § 4A1.3, which it said was designed to 'recognize[] that the criminal history score is unlikely to take into account all the variations in the seriousness of criminal history that may occur.' USSG § 4A1.3 (commentary)." *United States* v. *Beckham*, 968 F. 2d 47, 54 (CADC 1992); see also *United States* v. *Shoupe*, 988 F. 2d 440, 445 (CA3 1993) ("[I]n Guidelines § 4A1.3, the Commission specifically provided district courts with flexibility to adjust the criminal history category calculated through . . . rigid formulae"). Cf. Miller & Freed, Honoring Judicial Discretion Under the Sentencing Reform Act, 3 Fed. Sent. R. 235, 238 (1991) (discussing "Congress' desire to leave substantial sentencing discretion in the hands of the sentencing judge").

I therefore agree with the Court that it is "constitutionally permissible" for a federal court to "consider a prior uncounseled misdemeanor conviction" in sentencing a defendant under the Guidelines. *Ante,* at 748. That is enough to answer the constitutional question this case presents, whether "[t]he District Court should . . . have considered [petitioner's] previous uncounseled misdemeanor in computing [his] criminal history score" under the Guidelines. Pet. for Cert. i; see also Brief for United States I (stating question presented as "[w]hether it violated the Constitution for the sentencing court to consider petitioner's prior uncounseled misdemeanor conviction in determining his criminal history score under the Sentencing Guidelines"). And because petitioner did not below, and does not here, contend that counting his 1983 uncounseled conviction for driving under the influence placed him in a criminal-history category that "significantly over-represents the seriousness of [his] criminal history or the likelihood that [he] will commit further crimes," USSG

§ 4A1.3, the Court properly rejects petitioner's challenge to his sentence.

I am shy, however, of endorsing language in the Court's opinion that may be taken as addressing the constitutional validity of a sentencing scheme that automatically requires enhancement for prior uncounseled convictions, a scheme not now before us. Because I prefer not to risk offending the principle that "[t]he Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,'" *Ashwander*, 297 U. S., at 346 (citation omitted), I concur only in the judgment.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

In 1983, petitioner Kenneth O. Nichols pleaded *nolo contendere* to driving under the influence of alcohol (DUI) and paid a $250 fine. He was not represented by counsel. Under *Scott* v. *Illinois*, 440 U. S. 367 (1979), this uncounseled misdemeanor could not have been used as the basis for any incarceration, not even a 1-day jail sentence. Seven years later, when Nichols pleaded guilty to a federal drug charge, this uncounseled misdemeanor, used to enhance his sentence, led directly to his imprisonment for over two years. The majority's holding that this enhancement does not violate the Sixth Amendment is neither compelled by *Scott* nor faithful to the concern for reliability that lies at the heart of our Sixth Amendment cases since *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Accordingly, I dissent.

I

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *Gideon* v. *Wainwright*, this Court recognized the "Sixth Amendment's guarantee of counsel" as "'fundamental and essential to a fair trial,'" *id.*, at 342, because "'[e]ven the intelligent and educated layman

. . . requires the guiding hand of counsel at every step in the proceedings against him,'" *id.*, at 345, quoting *Powell* v. *Alabama*, 287 U. S. 45, 69 (1932).

Both the plain wording of the Amendment and the reasoning in *Gideon* would support the guarantee of counsel in "all" criminal prosecutions, petty or serious, whatever their consequences. See *Scott* v. *Illinois*, 440 U. S., at 376, 379 (Brennan, J., dissenting). Although the Court never has read the guarantee of counsel that broadly, one principle has been clear, at least until today: No imprisonment may be imposed on the basis of an uncounseled conviction. Thus, in *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), the Court rejected a formalistic distinction between petty and non-petty offenses and applied *Gideon* to "any criminal trial, where an accused is deprived of his liberty." *Id.*, at 32; *id.*, at 41, 42 (Burger, C. J., concurring in result) (because "any deprivation of liberty is a serious matter," no individual "can be imprisoned unless he is represented by counsel").

A year later, *Scott* confirmed that any deprivation of liberty, no matter how brief, triggers the Sixth Amendment's right to counsel:

> "Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. . . . We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." 440 U. S., at 373–374.

Finally, although the Court, in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980), in one sense, was "splintered," *ante*, at 740, a majority of the Court concluded that an uncounseled conviction could not be used to support a prison term, either initially, to punish the misdemeanor, or later, to lengthen the jail time for a subsequent conviction. See *Baldasar,* 446 U. S., at 224 (Stewart, J., concurring) (sentencing an indigent "to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense" violated *Scott*); 446 U. S., at 226 (Marshall, J., concurring) (even on *Scott*'s terms, a "prior uncounseled misdemeanor conviction could not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction"); 446 U. S., at 230 (BLACKMUN, J., concurring) (adhering to dissenting position in *Scott* that an uncounseled conviction is invalid not only where the defendant is sentenced to any actual incarceration but also where the defendant is convicted of an offense punishable by more than six months in prison).[1]

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[1] I dissented in *Scott* v. *Illinois,* 440 U. S. 367 (1979), in which five Members of the Court held that the Sixth Amendment required counsel only for convictions that were *punished* by actual imprisonment, and not for offenses that were *punishable* by imprisonment, but where imprisonment was not imposed. Believing that the line the Court drew did not protect indigent defendants adequately or keep faith with our Sixth Amendment principles, I argued for a right to counsel not only where the defendant was convicted and sentenced to jail time, but also where the defendant was convicted of any offense punishable by more than six months' imprisonment, regardless of the punishment actually imposed. *Id.,* at 389–390.

A year later, when the Court decided *Baldasar* v. *Illinois,* 446 U. S. 222 (1980), I adhered to this position, concurring in the Court's *per curiam* opinion and its judgment that the uncounseled conviction could not be used to justify increasing Baldasar's jail time. Although I based my decision on my belief that the uncounseled conviction was invalid in the first instance because Baldasar was charged with an offense punishable by more than six months in prison, I expressed no disagreement, and indeed had none, with the premise that an uncounseled conviction that was valid under *Scott* was invalid for purposes of imposing increased incarceration for a subsequent offense. 446 U. S., at 229–230. Obviously, logic dictates that, where the threat of imprisonment is enough to trigger the Sixth

Thus, the animating concern in the Court's Sixth Amendment jurisprudence has been to ensure that no indigent is deprived of his liberty as a result of a proceeding in which he lacked the guiding hand of counsel. While the Court has grappled with, and sometimes divided over, extending this constitutional guarantee beyond convictions that lead to actual incarceration, it has never permitted, before now, an uncounseled conviction to serve as the basis for any jail time.

II

Although the Court now expressly overrules *Baldasar* v. *Illinois, ante,* at 748, it purports to adhere to *Scott,* describing its holding as a "logical consequence" of *Scott, ante,* at 746. This logic is not unassailable. To the contrary, as Justice Marshall stated in *Baldasar,* "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases." 446 U. S., at 228–229 (concurring opinion). It is more logical, and more consistent with the reasoning in *Scott,* to hold that a conviction that is invalid for imposing a sentence for the offense itself remains invalid for increasing the term of imprisonment imposed for a subsequent conviction.

The Court skirts *Scott's* actual imprisonment standard by asserting that enhancement statutes "do not change the penalty imposed for the earlier conviction," *ante,* at 747, because they punish only the later offense. Although it is undeniable that recidivist statutes do not impose a second punishment for the first offense in violation of the Double Jeopardy Clause, *Moore* v. *Missouri,* 159 U. S. 673, 677 (1895), it also is undeniable that Nichols' DUI conviction directly resulted in more than two years' imprisonment. In any event, our concern here is not with multiple punishments, but with reliability. Specifically, is a prior uncounseled misdemeanor

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Amendment's guarantee of counsel, the actual imposition of imprisonment through an enhancement statute also requires the appointment of counsel.

conviction sufficiently reliable to justify additional jail time imposed under an enhancement statute? Because imprisonment is a punishment "different in kind" from fines or the threat of imprisonment, *Scott,* 440 U. S., at 373, we consistently have read the Sixth Amendment to require that courts decrease the risk of unreliability, through the provision of counsel, where a conviction results in imprisonment. That the sentence in *Scott* was imposed in the first instance and the sentence here was the result of an enhancement statute is a distinction without a constitutional difference.

The Court also defends its position by arguing that the process of sentencing traditionally is "less exacting" than the process of establishing guilt. *Ante,* at 747. This may be true as a general proposition,[2] but it does not establish that

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[2] In support of its position, the majority cites several cases that refer to a sentencing judge's traditional discretion. The cases provide scant, if any, support for the majority's rule sanctioning the use of prior uncounseled convictions as the basis for increased terms of imprisonment. None even addresses the Sixth Amendment guarantee of counsel.

In *McMillan* v. *Pennsylvania,* 477 U. S. 79 (1986), the Court held 5 to 4 that a state statute defining visible possession of a firearm as a sentencing consideration that could be proved by a preponderance of the evidence, rather than as an element of the crime that must be proved beyond a reasonable doubt, did not violate due process. *McMillan* did not involve the use of a prior conviction in a subsequent proceeding. Additionally, *McMillan* involved only felony convictions, in which the defendants were entitled to counsel at every step of the proceedings to assist in proving or disproving the facts to be relied on in sentencing. The Court also noted that the "risk of error" in the challenged proceeding was "comparatively slight" because visible possession was "a simple, straightforward issue susceptible of objective proof." *Id.,* at 84. The same cannot be said for the reliability of prior uncounseled misdemeanors. See *Argersinger* v. *Hamlin,* 407 U. S. 25, 34 (1972) (observing that the volume of misdemeanor cases "may create an obsession for speedy dispositions, regardless of the fairness of the result"); *id.,* at 35 (noting that "'[t]he misdemeanor trial is characterized by insufficient and frequently irresponsible preparation,'" quoting Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 The Legal Aid Brief Case 151, 152 (1970)). Moreover, a finding of visible possession did not expose a defendant to a greater or an uncounseled conviction is reliable enough for Sixth Amendment purposes to justify the imposition of imprisonment, even in the sentencing context. Nor does it follow that, because the state may attempt to prove at sentencing conduct justifying greater punishment, it also may rely on a prior uncounseled conviction. In *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), for example, the State was permitted to prove at sentencing that the defendant visibly possessed a firearm during the commission of the felonies of which he was convicted.[3] Where, as in *McMillan*, the state sets out

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additional punishment than otherwise authorized, *McMillan*, 477 U. S., at 88, while the prior conviction at issue here exposed petitioner to two additional years in prison.

Wisconsin v. *Mitchell*, 508 U. S. 476 (1993), in which the Court rejected a First Amendment challenge to a state statute that enhanced a penalty based on the defendant's motive, is no more helpful to the majority's position. The Court simply observed that the defendant's motive was a factor traditionally considered by sentencing judges; it said nothing about the validity of prior convictions or even about the standard required to prove the motive. Similarly, although *United States* v. *Tucker*, 404 U. S. 443, 446 (1972), made passing reference to a sentencing judge's broad inquiry, it held only that *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), required resentencing where the sentencing court had considered prior felony convictions that later were found to have been uncounseled.

Finally, *Williams* v. *New York*, 337 U. S. 241 (1949), was a Confrontation Clause challenge to a sentencing judge's consideration of evidence obtained through a presentence investigation. The court did not rely on any prior convictions; the defendant, who was represented by counsel, did not challenge the accuracy of the information the judge considered, ask the judge to disregard it, or seek to refute or discredit it; and the consideration of this information did not expose the defendant to a greater or additional punishment.

[3] *McMillan*, of course, was a due process case. Curiously, the Court appears to rest its holding as much on the Due Process Clause as on the Sixth Amendment. See *ante*, at 748. But even if the use of a prior uncounseled conviction does not violate due process, that does not conclusively resolve the Sixth Amendment question. Compare *Betts* v. *Brady*, 316 U. S. 455, 462 (1942) (holding that the right to counsel was not required under the Due Process Clause of the Fourteenth Amendment and recognizing due process as a "concept less rigid and more fluid than those envis-

to prove actual conduct rather than the fact of conviction in a sentencing proceeding at which the defendant is represented by counsel, counsel can put the state to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its allegations. See *Argersinger*, 407 U. S., at 31 (the accused "'requires the guiding hand of counsel *at every step in the proceedings* against him,'" quoting *Powell* v. *Alabama*, 287 U. S., at 69) (emphasis added). In contrast, where the state simply submits a record of a conviction obtained in a proceeding in which the defendant lacked the assistance of counsel, we lack similar confidence that the conviction reliably reflects the defendant's conduct.

Moreover, as a practical matter, introduction of a record of conviction generally carries greater weight than other evidence of prior conduct. Indeed, the United States Sentencing Commission's Guidelines (Guidelines) *require* a district court to assess criminal history points for prior convictions, and to impose a sentence within the range authorized by the defendant's criminal history, unless it concludes that a defendant's "criminal history category significantly over-

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aged in other specific and particular provisions of the Bill of Rights"), with *Gideon* v. *Wainwright*, 372 U. S., at 339 (holding that the Sixth Amendment requires counsel in all state felony prosecutions).

Nor do I read the majority's reliance on due process to reflect an understanding that due process requires only partial incorporation of the Sixth Amendment right to counsel in state courts. This Court long has recognized the "Sixth Amendment's guarantee of counsel" as "'fundamental and essential to a fair trial'" and therefore "made obligatory upon the States by the Fourteenth Amendment." *Id.*, at 342; see also *Johnson* v. *Zerbst*, 304 U. S. 458, 462 (1938) (the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty"); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243–244 (1936) ("the fundamental right of the accused to the aid of counsel in a criminal prosecution" is "safeguarded against state action by the due process of law clause of the Fourteenth Amendment"). No decision of this Court even has intimated that the Sixth Amendment right to counsel somehow is diluted or truncated in state proceedings.

represents the seriousness of a defendant's criminal history or the likelihood that a defendant will commit further crimes." United States Sentencing Commission, Guidelines Manual § 4A1.3 (Nov. 1993). Realistically, then, the conclusion that a state may prove prior conduct in a sentencing proceeding at which the defendant is aided by counsel does not support, much less compel, a conclusion that the state may, in lieu of proving directly the prior conduct, rely on a conviction obtained against an uncounseled defendant.[4]

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[4] JUSTICE SOUTER concludes that this provision passes Sixth Amendment muster by providing the defendant a "reasonable opportunity" to disprove the accuracy of the prior conviction. *Ante*, at 753. Even assuming that the Guidelines would permit a sentencing court to depart downward in response to a defendant's claim that his conviction resulted from his lack of sophistication or his calculation that it was cheaper to plead and pay a low fine than to retain counsel and litigate the charge, such a safety valve still does not accommodate reliability concerns sufficiently. As Chief Justice Burger recognized in *Argersinger*, "[a]ppeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record." 407 U. S., at 41 (concurring opinion). A collateral proceeding holds forth no greater promise of relief. The uncounseled misdemeanor convictions that are considered inherently unreliable under *Argersinger* and *Scott* are presumptively valid under most sentence enhancement schemes, see, *e. g., Custis* v. *United States, ante*, p. 485 (limiting a defendant's right to attack as unconstitutional a prior conviction used to enhance a sentence under the Armed Career Criminal Act of 1984, 18 U. S. C. § 924(e)); *Parke* v. *Raley*, 506 U. S. 20 (1992) (presumption of validity that attaches to final judgments properly extended to prior convictions used for sentence enhancement under a state recidivism statute), and are presumptively reflected in a defendant's criminal history score—and sentence—under the Guidelines, see United States Sentencing Commission, Guidelines Manual App. C, amdt. 353 (Nov. 1993) ("Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed").

Moreover, although it might be salutary for courts to consider under the Guidelines a defendant's reasons other than culpability for pleading *nolo contendere* to a prior misdemeanor conviction, I do not share JUSTICE

III

Contrary to the rule set forth by the Court, a rule that an uncounseled misdemeanor conviction *never* can form the basis for a term of imprisonment is faithful to the principle born of *Gideon* and announced in *Argersinger* that an uncounseled misdemeanor, like an uncounseled felony, is not reliable enough to form the basis for the severe sanction of incarceration. This Court in *Gideon* stated that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U. S., at 344. *Gideon* involved a felony, but we recognized in *Argersinger,* 407 U. S., at 31, that counsel was "often a requisite to the very existence of a fair trial" in misdemeanor cases, as well. In the absence of this "assurance" of or "requisite" to a fair trial, we cannot have confidence in the reliability of the conviction and, therefore, cannot impose a prison term based on it.

These reliability concerns have prompted this Court to hold that an uncounseled *felony* conviction cannot later be used to increase a prison term under a state recidivist statute, *Burgett* v. *Texas,* 389 U. S. 109 (1967), nor even be considered by a court in sentencing for a subsequent conviction, *United States* v. *Tucker,* 404 U. S. 443 (1972). The Court offers no reason and I can think of none why the same rules

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SOUTER's confidence that such a benevolent review of a defendant's circumstances is occurring now. Even if it were, a district court, after the most probing review, generally may depart downward only in "atypical" cases, outside the "heartland" carved by each guideline, United States Sentencing Commission, Guidelines Manual, ch. 1, pt. A, comment., 4(b) (Nov. 1991). This does not alleviate our concern in *Argersinger* that the "typical" misdemeanor case presents pressures to plead guilty or *nolo contendere,* regardless of the fairness or accuracy of that plea. 407 U. S., at 34–36. Accordingly, I find the district court's authority to depart downward too tenuous a check on the use of unreliable misdemeanor convictions to salvage a sentencing scheme that is, in my view, a violation of *Scott.*

should not apply with regard to uncounseled *misdemeanor* convictions. Counsel can have a profound effect in misdemeanor cases, where both the volume of cases and the pressure to plead are great. See *Argersinger*, 407 U. S., at 36 ("'[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel,'" quoting American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)); *Baldasar*, 446 U. S., at 228, n. 2 (Marshall, J., concurring) (recognizing that misdemeanor convictions may be less reliable than felony convictions because they are obtained through "assembly-line justice" and because jurors may be less scrupulous in applying the reasonable-doubt standard to a minor offense). Given the utility of counsel in these cases, the inherent risk of unreliability in the absence of counsel, and the severe sanction of incarceration that can result directly or indirectly from an uncounseled misdemeanor, there is no reason in law or policy to construe the Sixth Amendment to exclude the guarantee of counsel where the conviction subsequently results in an increased term of incarceration.

Moreover, the rule that an uncounseled misdemeanor conviction can never be used to increase a prison term is eminently logical, as Justice Marshall made clear in *Baldasar:*

> "An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Id.*, at 227–228 (concurring opinion).[5]

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[5] From another perspective, the prior uncounseled conviction can be viewed as a "hybrid" conviction: valid for the purpose of imposing a sentence, but invalid for the purpose of depriving the accused of his lib-

Finally, this rule is workable. As the Court has engaged in "constitutional line drawing" to determine the "precise limits and . . . ramifications" of *Gideon*'s principles, *Scott*, 440 U. S., at 372, it has sought to draw a clear line, one that adequately informs judges, prosecutors, and defendants of the consequences of their actions and decisions. Under the clear rule that an uncounseled misdemeanor conviction can never justify any term of imprisonment, the judge and the parties will know, at the beginning of a misdemeanor trial, that no imprisonment may be imposed, directly or collaterally, based on that proceeding, unless counsel is appointed to represent the indigent accused. See *Argersinger*, 407 U. S., at 42 (Burger, C. J., concurring in result). Admittedly, this rule might cause the state to seek and judges to grant appointed counsel for more indigent defendants, in order to preserve the right to use the conviction later for enhancement purposes. The Sixth Amendment guarantee of counsel should not be subordinated to these costs. See *id.*, at 43, 44 (Burger, C. J., concurring in result) (accepting that the Court's holding would require the appointment of more defense counsel). In any event, the majority's rule, which exposes indigent defendants to substantial sentence enhancements on the basis of minor offenses, may well have the same result by encouraging more indigent defendants to seek counsel and to litigate offenses to which they other-

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erty. See *Baldasar*, 446 U. S., at 232 (Powell, J., dissenting). There is nothing intuitively offensive about a "hybrid." See *id.*, at 226 (Marshall, J., concurring) (noting and accepting that Baldasar's conviction was not valid for all purposes); see also 15 U. S. C. § 16(a) (certain consent decrees or consent judgments in favor of the Government in a civil or criminal antitrust action shall not be prima facie evidence in a subsequent proceeding brought by another party); § 16(h) (district court proceedings leading to a consent judgment proposed by the Government are inadmissible as evidence in subsequent proceedings); 10 J. von Kalinowski, Antitrust Laws and Trade Regulation § 105.02[10], p. 110 (1993) ("[A]llegations based on pleas of *nolo contendere* in government suits, and the judgments entered thereon, should *not* be included in the complaint" in a subsequent action).

wise might have pleaded. This case is illustrative. When charged with driving under the influence, petitioner sought out an attorney, who told him that he did not need a lawyer if he was pleading *nolo contendere*. This advice made sense if a $250 fine was the only consequence of the plea. Its soundness is less apparent where the consequences can include a 2-year increase in a prison sentence down the road.

IV

With scant discussion of Sixth Amendment case law or principles, the Court today approves the imposition of two years of incarceration as the consequence of an uncounseled misdemeanor conviction. Because uncounseled misdemeanor convictions lack the reliability this Court has always considered a prerequisite for the imposition of any term of incarceration, I dissent.

JUSTICE GINSBURG, dissenting.

In *Custis* v. *United States, ante*, p. 485, the Court held that, with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to attack collaterally a prior state conviction used to enhance his sentence under the Armed Career Criminal Act of 1984. This case is dispositively different.

Custis presented a forum question. The issue was *where*, not *whether*, the defendant could attack a prior conviction for constitutional infirmity. See *ante*, at 497 (Custis "may attack his state sentence in Maryland or through federal habeas review").

Here, we face an uncounseled prior conviction tolerable under the Sixth Amendment "assistance of counsel" guarantee only because it did not expose defendant Nichols to the prospect of incarceration. See *Scott* v. *Illinois*, 440 U. S. 367 (1979). Today's decision enlarges the impact of that uncounseled conviction. It turns what was a disposition allowing no jail time—a disposition made for one day and case alone—into a judgment of far heavier weight. Nichols does not attack his prior uncounseled conviction for what it was. He is seeking only to confine that conviction to the term (no incarceration) that rendered it constitutional.

Recognizing that the issue in this case is not like the one presented in *Custis*, I join JUSTICE BLACKMUN's dissenting opinion.

DEPARTMENT OF REVENUE OF MONTANA *v.* KURTH RANCH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93–144. Argued January 19, 1994—Decided June 6, 1994

Montana law enforcement officers raided the farm of respondents—members of the extended Kurth family—arrested them, and confiscated and later destroyed their marijuana plants. After the Kurths pleaded guilty to drug charges, petitioner revenue department attempted, in a separate proceeding, to collect a state tax imposed on the possession and storage of dangerous drugs. That tax is collected only after any state or federal fines or forfeitures have been satisfied, and taxpayers must file a return after they are arrested. In bankruptcy proceedings filed by the Kurths, they objected to petitioner's proof of claim for the tax and challenged the tax's constitutionality. The Bankruptcy Court held, among other things, that the assessment on harvested marijuana, a portion of which resulted in a tax eight times the product's market value, was a form of double jeopardy invalid under the Federal Constitution, and the District Court affirmed. In affirming, the Court of Appeals determined that the central inquiry under *United States* v. *Halper*, 490 U. S. 435, is whether the sanction imposed is rationally related to the damages the government suffered, that the Kurths were entitled to an accounting to determine if the sanction constituted an impermissible second punishment, and that the tax was unconstitutional as applied to them because the State refused to offer any such evidence.

Held: The tax violates the constitutional prohibition against successive punishments for the same offense. Pp. 776–784.

(a) Although deciding in *Halper* that a legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character, and that a defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding, the Court did not consider whether a tax may similarly be characterized as punitive. However, the Court's recognition that the extension of a so-called tax's penalizing feature can cause it to lose its character as such and become a mere penalty, *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40, 46, together with *Halper*'s unequivocal statement that labels do not control in a double jeopardy inquiry, indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax. Pp. 776–780.

(b) While taxes are usually motivated by revenue-raising rather than punitive purposes, Montana's tax departs far from normal revenue laws. Its high rate and deterrent purpose, in and of themselves, do not necessarily render it punitive, but other unusual features set it apart from most taxes. That it is conditioned on the commission of a crime is significant of penal and prohibitory intent rather than the gathering of revenue. It is also exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place. Since the taxed activity is completely forbidden, the legitimate revenue-raising purpose that might support the tax could be equally well served by increasing the fine imposed upon conviction. In addition, it purports to be a property tax, yet it is levied on goods—here, the destroyed marijuana plants—that the taxpayer neither owns nor possesses. Pp. 780–783.

(c) Since tax statutes serve a purpose quite different from civil penalties, it is inappropriate to subject Montana's tax to *Halper*'s test for a civil penalty: whether the penalty is imposed as a remedy for actual costs to the State that are attributable to the defendant's conduct. Moreover, Montana has not claimed that its assessments can be justified on such grounds, and the same formula would have been used to compute the assessment regardless of the State's damages or whether it suffered any damages. Montana's tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. It is a second punishment that must be imposed during the first prosecution or not at all. P. 784.

986 F. 2d 1308, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BLACKMUN, KENNEDY, SOUTER, and GINSBURG, JJ., joined. REHNQUIST, C. J., *post*, p. 785, and O'CONNOR, J., *post*, p. 792, filed dissenting opinions. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 798.

Paul Van Tricht, Special Assistant Attorney General of Montana, argued the cause for petitioner. With him on the briefs was *David W. Woodgerd*, Special Assistant Attorney General.

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Days* and *Deputy Solicitor General Bender*.

James H. Goetz argued the cause and filed a brief for respondents.*

JUSTICE STEVENS delivered the opinion of the Court.

This case presents the question whether a tax on the possession of illegal drugs assessed after the State has imposed a criminal penalty for the same conduct may violate the constitutional prohibition against successive punishments for the same offense.[1]

**Dan Morales,* Attorney General of Texas, and *William E. Storie,* Assistant Attorney General, filed a brief for the State of Texas et al. as *amici curiae* urging reversal, joined by the Attorneys General for their respective States as follows: *Grant Woods* of Arizona, *Daniel E. Lungren* of California, *Gale Norton* of Colorado, *Richard Blumenthal* of Connecticut, *Robert A. Butterworth* of Florida, *Michael J. Bowers* of Georgia, *Robert A. Marks* of Hawaii, *Larry EchoHawk* of Idaho, *Roland W. Burris* of Illinois, *Pamela Fanning Carter* of Indiana, *Bonnie J. Campbell* of Iowa, *Robert T. Stephan* of Kansas, *Richard P. Ieyoub* of Louisiana, *Michael E. Carpenter* of Maine, *Hubert H. Humphrey III* of Minnesota, *Don Stenberg* of Nebraska, *Frederick P. DeVesa* of New Jersey, *Tom Udall* of New Mexico, *Michael F. Easley* of North Carolina, *Jeffrey B. Pine* of Rhode Island, *T. Travis Medlock* of South Carolina, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, and *James E. Doyle* of Wisconsin.

[1] The Fifth Amendment provides that "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. See *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969). Although its text mentions only harms to "life or limb," it is well settled that the Amendment covers imprisonment and monetary penalties. See, *e. g., Ex parte Lange,* 18 Wall. 163 (1874); *United States* v. *Halper,* 490 U. S. 435 (1989). In *Benton* v. *Maryland,* 395 U. S. 784, 794 (1969), we held that this guarantee "represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." See W. LaFave & J. Israel, Criminal Procedure 1058–1059 (2d ed. 1992); 2 D. Rudstein, C. Erlinder, & D. Thomas, Criminal Constitutional Law ¶ 11.01[3][b], pp. 11–59 to 11–60 (1993).

I

Montana's Dangerous Drug Tax Act[2] took effect on October 1, 1987. The Act imposes a tax "on the possession and storage of dangerous drugs,"[3] Mont. Code Ann. § 15–25–111 (1987), and expressly provides that the tax is to be "collected only after any state or federal fines or forfeitures have been satisfied." § 15–25–111(3). The tax is either 10 percent of the assessed market value of the drugs as determined by the Montana Department of Revenue (DOR) or a specified amount depending on the drug ($100 per ounce for marijuana, for example, and $250 per ounce for hashish), whichever is greater. § 15–25–111(2). The Act directs the state treasurer to allocate the tax proceeds to special funds to support "youth evaluation" and "chemical abuse" programs and "to enforce the drug laws." §§ 15–25–121, 15–25–122.[4]

In addition to imposing reporting responsibilities on law enforcement agencies,[5] the Act also authorizes the DOR to adopt rules to administer and enforce the tax. Under those rules, taxpayers must file a return within 72 hours of their arrest. Mont. Admin. Rule 42.34.102(1) (1988). The Rule also provides that "[a]t the time of arrest law enforcement personnel shall complete the dangerous drug information report as required by the department and afford the taxpayer an opportunity to sign it." Rule 42.34.102(3). If the taxpayer refuses to do so, the law enforcement officer is required to file the form within 72 hours of the arrest. *Ibid.* The "associated criminal nature of assessments under this act" justifies the expedited collection procedures. See Rule 42.34.103(3). The taxpayer has no obligation to file a return or to pay any tax unless and until he is arrested.

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[2] Mont. Code Ann. §§ 15–25–101 through 15–25–123 (1987). See *In re Kurth Ranch,* 145 B. R. 61, 66 (Bkrtcy. Ct. Mont. 1990). We refer throughout this opinion to the 1987 edition of the Montana Code—the version in effect at the time of the Kurths' arrest. Some sections of the Dangerous Drug Tax Act have since been amended.

[3] The Act defines "dangerous drug" as that term is defined in the Montana Code provisions that criminalize the possession of such drugs, see Mont. Code Ann. §§ 15–25–103(2), 50–32–101(6), 45–9–102 (1987), and authorize their seizure, see § 44–12–103.

[4] According to the Act's preamble, the Montana Legislature recognizes that the use of dangerous drugs is not acceptable, but concludes that because the manufacturing and sale of such drugs has an economic impact on the State, "it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana." 1987 Mont. Laws, ch. 563, p. 1416.

[5] Section 5(1) of the Act provides that "[a]ll law enforcement personnel and peace officers shall promptly report each person subject to the tax to the department, together with such other information which the depart-

II

The six respondents, all members of the extended Kurth family, have for years operated a mixed grain and livestock farm in central Montana.[6] In 1986 they began to cultivate and sell marijuana. About two weeks after the new Dangerous Drug Tax Act went into effect, Montana law enforcement officers raided the farm, arrested the Kurths, and confiscated all the marijuana plants, materials, and paraphernalia they found. *In re Kurth Ranch*, 145 B. R. 61, 66 (Bkrtcy. Ct. Mont. 1990).[7] The raid put an end to the

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ment may require, in a manner and on a form prescribed by the department." Mont. Code Ann. § 15–25–113(1) (1987).

[6] The respondents are Richard Kurth; his wife, Judith Kurth; their son, Douglas Kurth; their daughter, Cindy Halley; Douglas' wife, Rhonda Kurth; and Cindy's husband, Clayton Halley.

[7] The Drug Tax Report listed the following seized items:

"Item #1: 2155 marijuana plants in various stages of growth,

"Item #2: 7 gallons of hash oil, (lined out),

"Item #3: 4 bags of marijuana at two pounds each,

"Item #4: 65/one gram vials of hash tar,

"Item #5: 14 baby food size jars of hash tar,

"Item #6: 7 pint jars of hash tar,

marijuana business and gave rise to four separate legal proceedings.

In one of those proceedings, the State filed criminal charges against all six respondents in the Montana District Court, charging each with conspiracy to possess drugs with the intent to sell, Mont. Code Ann. § 45–4–102 (1987), or, in the alternative, possession of drugs with the intent to sell, § 45–9–103.[8] Each respondent initially pleaded not guilty, but subsequently entered into a plea agreement. On July 18, 1988, the court sentenced Richard Kurth and Judith Kurth to prison and imposed suspended or deferred sentences on the other four family members.[9]

The county attorney also filed a civil forfeiture action seeking recovery of cash and equipment used in the marijuana operation. The confiscated drugs were not involved in that action, presumably because law enforcement agents had destroyed them after an inventory. Respondents settled the forfeiture action with an agreement to forfeit $18,016.83 in cash and various items of equipment.

"Item #7: 1 bag of marijuana, 1/4 pound,

"Item #8: 5 plastic bags of marijuana, total 2230 grams,

"Item #9: approximately 100 pounds of marijuana stems, leaves, parts, etc." 145 B. R., at 66–67.

[8] Plaintiff's Exhs. 3, 5, 7, 9, 11, 13; 145 B. R., at 64–65. Richard Kurth was also charged with criminal sale of dangerous drugs (marijuana), Mont. Code Ann. § 45–9–101 (1987), criminal possession of a dangerous drug (marijuana) with intent to sell, § 45–9–103, solicitation to commit the offense of criminal possession of a dangerous drug (marijuana) with intent to sell, § 45–4–101, and criminal possession of a dangerous drug (hashish), § 45–9–102. See Plaintiff's Exh. 3.

[9] Because only one respondent, Richard Kurth, was adjudged guilty of the offense of possession (the other five pleaded guilty to the conspiracy count), Montana has suggested that only he has standing to argue that the tax on possession constitutes a second punishment for the same offense. Respondents counter that Montana's withdrawal of the possession charges pursuant to the plea agreements would bar a second prosecution for possession. The issue was not raised below, so we do not address it.

The third proceeding involved the assessment of the new tax on dangerous drugs. Despite difficulties the DOR had in applying the Act for the first time, it ultimately attempted to collect almost $900,000 in taxes on marijuana plants, harvested marijuana, hash tar and hash oil, interest, and penalties.[10] The Kurths contested the assessments in administrative proceedings. Those proceedings were automatically stayed in September 1988, however, when the Kurths initiated the fourth legal proceeding triggered by the raid on their farm: a petition for bankruptcy under Chapter 11 of the Bankruptcy Code. See 11 U. S. C. § 362(a).

In the bankruptcy proceedings, the Kurths objected to the DOR's proof of claim for unpaid drug taxes and challenged the constitutionality of the Montana tax. After a trial, the Bankruptcy Court held most of the assessment invalid as a matter of state law,[11] but concluded that an assessment of $181,000 on 1,811 ounces of harvested marijuana was authorized by the Act. It held that assessment invalid under the Federal Constitution.

Relying primarily on *United States* v. *Halper,* 490 U. S. 435 (1989), the Bankruptcy Court decided that the assessment constituted a form of double jeopardy. The court rejected the State's argument that the tax was not a penalty because it was designed to recover law enforcement costs; as the court noted, the DOR "failed to introduce one scintilla of evidence as to cost of the above government programs or costs of law enforcement incurred to combat illegal drug activity." 145 B. R., at 74. After noting that a portion of the assessment resulted in a tax eight times the product's market value,[12] the court explained that the punitive character of the tax was evident

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[10] The precise figure appears to be $894,940.99. 145 B. R., at 68. The Court of Appeals' figure of "nearly $865,000," *In re Kurth Ranch,* 986 F. 2d 1308, 1310 (CA9 1993), apparently failed to take account of the $30,000 collected before computation of the final assessment. 145 B. R., at 68.

[11] Specifically, the Bankruptcy Court held that the assessments on the live marijuana plants and the marijuana oil were "arbitrary" and "lacked any basis in fact." *Id.,* at 69.

> "because drug tax laws have historically been regarded as penal in nature, the Montana Act promotes the traditional aims of punishment—retribution and deterrence, the tax applies to behavior which is already a crime, the tax allows for sanctions by restraint of Debtors' property, the tax requires a finding of illegal possession of dangerous drugs and therefore a finding of *scienter*, the tax will promote elimination of illegal drug possession, and the tax appears excessive in relation to the alternate purpose assigned, especially in the absence of any record developed by the State as to societal costs. Finally, the tax follows arrest for possession of illegal drugs and the tax report is made by law enforcement officers, not the taxpayer, who may or may not sign the report." *Id.*, at 75–76.

These aspects led the court to the "inescapable conclusion" that the drug tax statute's purpose was deterrence and punishment. *Id.*, at 76.

The District Court affirmed. Agreeing with the Bankruptcy Court's findings and reasoning, it concluded that the Montana Dangerous Drug Tax Act "simply punishes the Kurths a second time for the same criminal conduct." *In re Kurth Ranch*, CV–90–084–GF, 1991 WL 365065 (D. Mont., Apr. 23, 1991) (reprinted at App. to Pet. for Cert. 22). That and the DOR's failure to provide an accounting of its actual damages or costs convinced the Bankruptcy Court that the tax assessments violated the Fifth Amendment's Double Jeopardy Clause. *Ibid.*

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[12] That portion is the tax imposed upon 100 pounds of "shake." "Shake" refers to the stems, leaves, and other loose parts of the marijuana plant that have less value because of their lower levels of tetrahydrocannabinol (THC), the chemical substance in marijuana that activates a user's senses. *Id.*, at 66. Officials placed the market value for shake at $200 per pound. Thus, when Montana taxed the shake at $100 per ounce, or $1,600 per pound, it taxed it at eight times its market value. *Id.*, at 72.

The Court of Appeals for the Ninth Circuit also affirmed, but based its conclusion largely on the State's refusal to offer evidence justifying the tax, and accordingly refused to hold the tax unconstitutional on its face. *In re Kurth Ranch*, 986 F. 2d 1308, 1312 (1993). The court first determined that under *Halper*, a disproportionately large civil penalty can be punitive for double jeopardy purposes. 986 F. 2d, at 1310. That the assessment is called a tax, as opposed to some kind of penalty, is not controlling. *Id.*, at 1310–1311. The central inquiry under *Halper*, the court determined, is whether the sanction imposed is rationally related to the damages the government suffered. 986 F. 2d, at 1311. That inquiry only applies to cases in which there has been a separate criminal conviction, however.[13] The court concluded that the Kurths were entitled to an accounting to determine if the sanction constitutes an impermissible second punishment, and because the State refused to offer any such evidence, it held the tax unconstitutional as applied to the Kurths. *Id.*, at 1312.

While this case was pending on appeal, the Montana Supreme Court reversed two lower state-court decisions that had held that the Dangerous Drug Tax Act was a form of double jeopardy. *Sorensen* v. *State Dept. of Revenue*, 254 Mont. 61, 836 P. 2d 29 (1992). Over the dissent of two justices, the State Supreme Court found that the legislature had intended to establish a civil, not a criminal, penalty and that the tax had a remedial purpose other than promoting retribution and deterrence. *Id.,* at 65, 836 P. 2d, at 31. The court found that *Halper* was not controlling, both because it expressly announced " 'a rule for the rare case' " and because the case involved a civil penalty, not a tax. 254 Mont., at 67, 836 P. 2d, at 32–33. The *Sorensen* court concluded that the drug tax was not excessive and that a tax, unlike the civil sanction at issue in *Halper,* requires no proof of the State's remedial costs on the part of the State. 254 Mont., at 67–68, 836 P. 2d, at 33.

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[13] It is on this basis that the court distinguished this Court's cases holding a federal marijuana tax to be nonpunitive, see *Minor* v. *United States*, 396 U. S. 87 (1969); *United States* v. *Sanchez*, 340 U. S. 42 (1950), which did not involve previous criminal convictions. 986 F. 2d, at 1311. The court acknowledged that a State may legitimately tax criminal activities, *ibid.*, (citing *Marchetti* v. *United States*, 390 U. S. 39, 44 (1968)), and that a civil sanction need not satisfy a remedial analysis when it is imposed apart from a criminal conviction. 986 F. 2d, at 1311 (citing *Commonwealth Edison Co.* v. *Montana*, 453 U. S. 609, 623 (1981)).

The Montana Supreme Court's decision is directly at odds with the conclusion reached in the federal proceedings involving the Kurths. We therefore granted certiorari to review the decision of the Court of Appeals. 509 U. S. 953 (1993). We now affirm its judgment.

III

In *Halper* we considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." 490 U. S., at 436. Our answer to that question does not decide the different question whether Montana's tax should be characterized as punishment.

Halper was convicted of 65 separate violations of the criminal false claims statute, 18 U. S. C. § 287, each involving a demand for $12 in reimbursement for medical services worth only $3. After Halper was sentenced to two years in prison and fined $5,000, the Government filed a separate action to recover a $2,000 civil penalty for each of the 65 violations. See 31 U. S. C. § 3729 (1982 ed., Supp. II). The District Court found that the $130,000 recovery the statute authorized "bore no 'rational relation' to the sum of the Government's $585 actual loss plus its costs in investigating and prosecuting Halper's false claims." 490 U. S., at 439. In the court's view, a civil penalty "more than 220 times greater than the Government's measurable los[s] qualified as punishment" that was barred by the Double Jeopardy Clause. *Ibid.*

On direct appeal to this Court, we rejected the Government's submission that the Double Jeopardy Clause only applied to punishment imposed in criminal proceedings, reasoning that its violation "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." *Id.*, at 447.[14] In making such an assessment, "the labels 'criminal' and 'civil' are not of paramount importance." *Ibid.* Accepting the District Court's findings, we held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.*, at 448–449.

Halper thus decided that the legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character.[15] We also recognized in *Halper* that a so-called civil "penalty" may be remedial in character if it merely reimburses the government for its actual costs arising from the defendant's criminal conduct. *Id.*, at 449–450,

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[14] We noted, however, that whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the "sting of punishment." 490 U. S., at 447, n. 7 (citing *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 551 (1943)).

[15] Notably, in reaching that conclusion we relied in part on an earlier case recognizing that a tax statute might be considered punitive in character for double jeopardy purposes. See 490 U. S., at 443. That case, *United States* v. *La Franca*, 282 U. S. 568 (1931), observed that the words "tax" and "penalty" "are not interchangeable, one for the other" and that "if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." *Id.*, at 572. See also *Lipke* v. *Lederer*, 259 U. S. 557, 561 (1922) ("The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid").

452. We therefore remanded the case to the District Court to determine what portion of the statutory penalty could be sustained as compensation for the Government's actual damages.

Halper did not, however, consider whether a tax may similarly be characterized as punitive.

IV

Criminal fines, civil penalties, civil forfeitures, and taxes all share certain features: They generate government revenues, impose fiscal burdens on individuals, and deter certain behavior. All of these sanctions are subject to constitutional constraints. A government may not impose criminal fines without first establishing guilt by proof beyond a reasonable doubt. Cf. *In re Winship,* 397 U. S. 358 (1970). A defendant convicted and punished for an offense may not have a nonremedial civil penalty imposed against him for the same offense in a separate proceeding. *United States* v. *Halper,* 490 U. S. 435 (1989). A civil forfeiture may violate the Eighth Amendment's proscription against excessive fines. *Austin* v. *United States,* 509 U. S. 602 (1993). And a statute imposing a tax on unlawful conduct may be invalid because its reporting requirements compel taxpayers to incriminate themselves. *Marchetti* v. *United States,* 390 U. S. 39 (1968).

As a general matter, the unlawfulness of an activity does not prevent its taxation. *Id.,* at 44; *United States* v. *Constantine,* 296 U. S. 287, 293 (1935); *James* v. *United States,* 366 U. S. 213 (1961). Montana no doubt could collect its tax on the possession of marijuana, for example, if it had not previously punished the taxpayer for the same offense, or, indeed, if it had assessed the tax in the same proceeding that resulted in his conviction. *Missouri* v. *Hunter,* 459 U. S. 359, 368–369 (1983); see also *Halper,* 490 U. S., at 450. Here, we ask only whether the tax has punitive characteristics that subject it to the constraints of the Double Jeopardy Clause.

Although we have never held that a tax violated the Double Jeopardy Clause, we have assumed that one might.[16] In the context of other constitutional requirements, we have repeatedly examined taxes for constitutional validity. We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect. *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40, 44 (1934). Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment." *Id.,* at 46 (citing *Child Labor Tax Case,* 259 U. S. 20, 38 (1922)). That comment, together with *Halper*'s unequivocal statement that labels do not control in a double jeopardy inquiry, indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax.

Halper recognized that "[t]his constitutional protection is intrinsically personal," and that only "the character of the actual sanctions" can substantiate a possible double jeopardy violation. 490 U. S., at 447. Whereas fines, penalties, and forfeitures are readily characterized as sanctions, taxes are typically different because they are usually motivated by revenue-raising, rather than punitive, purposes. Yet at some point, an exaction labeled as a tax approaches punishment, and our task is to determine whether Montana's drug tax crosses that line.

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[16] In *Helvering* v. *Mitchell,* 303 U. S. 391 (1938), for example, this Court considered a Revenue Act provision requiring the taxpayer to pay an additional 50 percent of the total amount of any deficiency due to fraud with an intent to evade the tax. The Court assumed such a penalty could trigger double jeopardy protection if it were intended for punishment, but it nevertheless held that the statute was constitutional because the 50 percent addition to the tax was remedial, not punitive. *Id.,* at 398–405. Although the penalty at issue in *Mitchell* is arguably better characterized as a sanction for fraud than a tax, the Court described it interchangeably as a "sanction," *id.,* at 405, 406, an "addition to the tax," *id.,* at 405, an "assessment," *id.,* at 396, and a "tax," *id.,* at 398, making nothing of the potential import of the distinction.

We begin by noting that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax as a form of punishment. In this case, although those factors are not dispositive, they are at least consistent with a punitive character. A significant part of the assessment was more than eight times the drug's market value—a remarkably high tax.[17] That the Montana Legislature intended the tax to deter people from possessing marijuana is beyond question.[18] The DOR reminds us, however, that many taxes that are presumed valid, such as taxes on cigarettes and alcohol, are also both high and motivated to some extent by an interest in deterrence. Indeed, although no double jeopardy challenge was at issue, this Court sustained the steep $100-per-ounce federal tax on marijuana in *United States* v. *Sanchez*, 340 U. S. 42 (1950). Thus, while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, do not necessarily render the tax punitive. Cf. *Sonzinsky* v. *United States*, 300 U. S. 506, 513–514 (1937).

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[17] The State recovered 1,811 ounces of marijuana with an estimated value of $46,000, and taxed the marijuana at $100 per ounce (that is, the greater of 10 percent of market value or $100 per ounce), for a total tax of $181,000. The State thus taxed the drugs at about 400 percent of their market value. Compared to similar taxes on legal goods and activities, Montana's tax—assessed at a rate of 10 percent or roughly 400 percent of market value, *whichever is greater*—appears to be unrivaled. Even the taxes identified by the United States, which supports the DOR as *amicus curiae*, do not approach a level this high. See Brief for United States as *Amicus Curiae* 23–24. The United States notes hypothetically, for example, that the current 24-cent-per-pack federal tax on cigarettes could, under a new health plan, be increased to 99 cents, resulting in a total tax burden that "could easily surpass" the 80 percent rate that Montana imposed on the part of the marijuana consisting of the higher valued "'buds.'" *Ibid.* The Government offers no such example, however, of a tax equivalent to that assessed on the combined cache of buds and lower valued "shake." See n. 12, *supra.*

[18] For example, although the Act's preamble evinces a clear motivation to raise revenue, it also indicates that the tax will provide for anticrime initiatives by "burdening" violators of the law instead of "law abiding taxpayers"; that use of dangerous drugs is not acceptable; and that the Act is not intended to "give credence" to any notion that manufacturing, selling, or using drugs is legal or proper. 1987 Mont. Laws, ch. 563, p. 1416.

Other unusual features, however, set the Montana statute apart from most taxes. First, this so-called tax is conditioned on the commission of a crime. That condition is "significant of penal and prohibitory intent rather than the gathering of revenue."[19] Moreover, the Court has relied on the absence of such a condition to support its conclusion that a particular federal tax was a civil, rather than a criminal, sanction.[20] In this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place.[21] Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.

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[19] *United States* v. *Constantine*, 296 U. S. 287, 295 (1935) (concluding that a tax was motivated by penal instead of revenue-raising intent in part because the taxpayer had to pay an additional sum based on his illegal conduct). See also *United States* v. *La Franca*, 282 U. S., at 571, 575 (holding that a liquor tax assessed only against those prosecuted for illegal manufacture or sale of liquor was barred on statutory grounds, thus avoiding the "grave constitutional question" whether double jeopardy principles precluded such an assessment).

[20] In *Sanchez* we examined a federal marijuana tax, IRC § 2590–(a)(2) (since repealed, but last codified at 26 U. S. C. § 4741 *et seq.* (1964)), that taxed the transfer of marijuana to a person who has not paid a special tax and registered. Under the statute, the transferor's liability arose when the transferee failed to pay the tax; as a result, "[s]ince his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction." 340 U. S., at 45.

[21] This statute therefore does not raise the question whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character. See JUSTICE

Taxes imposed upon illegal activities are fundamentally different from taxes with a pure revenue-raising purpose that are imposed *despite* their adverse effect on the taxed activity. But they differ as well from mixed-motive taxes that governments impose both to deter a disfavored activity and to raise money. By imposing cigarette taxes, for example, a government wants to discourage smoking. But because the product's benefits—such as creating employment, satisfying consumer demand, and providing tax revenues—are regarded as outweighing the harm, that government will allow the manufacture, sale, and use of cigarettes as long as the manufacturers, sellers, and smokers pay high taxes that reduce consumption and increase government revenue. These justifications vanish when the taxed activity is completely forbidden, for the legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction.[22]

SCALIA's dissent, *post,* at 804. Nor does the statute require us to comment on the permissibility of "multiple punishments" imposed in the same proceeding, cf. *Ex parte Lange,* 18 Wall. 163 (1874); *North Carolina* v. *Pearce,* 395 U. S. 711 (1969), since it involves separate sanctions imposed in *successive* proceedings.

[22] In this case, it is significant that the same sovereign that criminalized the activity also imposed the tax. Contrarily, most of our cases confirming that the unlawfulness of an activity does not prevent its taxation involve taxes on acts prohibited by other sovereigns. For example, *United States* v. *Constantine,* 296 U. S. 287 (1935), involved a federal excise tax on retail liquor sales that violated state law. *Id.,* at 293. Likewise, in *James* v. *United States,* 366 U. S. 213 (1961), a federal tax on embezzled money was imposed upon a man who had pleaded guilty in state court to conspiracy to embezzle. *Id.,* at 214. And *Marchetti* v. *United States,* 390 U. S. 39 (1968), involved a federal tax on gambling activities primarily prohibited under state law, though as the Court there noted, some federal statutes also prohibited activities ancillary to wagering. *Id.,* at 44–47. The importance of the distinction between same sovereign proceedings

The Montana tax is exceptional for an additional reason. Although it purports to be a species of property tax—that is, a "tax on the possession and storage of dangerous drugs," Mont. Code Ann. § 15–25–111 (1987)—it is levied on goods that the taxpayer neither owns nor possesses when the tax is imposed. Indeed, the State presumably *destroyed* the contraband goods in this case before the tax on them was assessed. If a statute that amounts to a confiscation of property is unconstitutional, *Heiner* v. *Donnan*, 285 U. S. 312, 326 (1932); *Nichols* v. *Coolidge*, 274 U. S. 531, 542 (1927), a tax on previously confiscated goods is at least questionable.[23] A tax on "possession" of goods that no longer exist and that the taxpayer never lawfully possessed has an unmistakable punitive character. This tax, imposed on criminals and no others, departs so far from normal revenue laws as to become a form of punishment.

Taken as a whole, this drug tax is a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis.[24]

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and dual sovereign proceedings also is borne out by our cases holding that the Constitution does not prohibit successive prosecutions by different sovereigns based on the same conduct. See, *e. g., Bartkus* v. *Illinois*, 359 U. S. 121 (1959) (state prosecution after federal); *Abbate* v. *United States*, 359 U. S. 187 (1959) (federal prosecution after state).

[23] Curiously, one of two alternative measures of the tax is the market value of a substance that cannot legally be marketed.

[24] Courts—including this Court in *United States* v. *Sanchez*, 340 U. S. 42 (1950)—have frequently commented on the punishing and deterrent nature of drug taxes. See, *e. g., Sims* v. *State Tax Comm'n*, 841 P. 2d 6, 13 (Utah 1992); *Rehg* v. *Illinois Dept. of Revenue*, 152 Ill. 2d 504, 515, 605 N. E. 2d 525, 531 (1992); *State* v. *Gallup*, 500 N. W. 2d 437, 445 (Iowa 1993); *State* v. *Roberts*, 384 N. W. 2d 688, 691 (S. D. 1986); *State* v. *Berberich*, 284 Kan. 854, 811 P. 2d 1192, 1200 (1991); *State* v. *Durrant*, 244 Kan. 522, 769 P. 2d 1174, 1181, cert. denied *sub nom. Dressel* v. *Kansas*, 492 U. S. 923 (1989).

V

Because Montana's tax is fairly characterized as punishment, the judgment of the Court of Appeals must be affirmed. In *Halper*, we recognized that a civil penalty may be imposed as a remedy for actual costs to the State that are attributable to the defendant's conduct. 490 U. S., at 452. Yet as THE CHIEF JUSTICE points out, tax statutes serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive "simply does not work in the case of a tax statute." *Post*, at 787 (dissenting opinion). Subjecting Montana's drug tax to *Halper*'s test for civil penalties is therefore inappropriate. Even if it were proper to permit such a showing, Montana has not claimed that its assessment in this case even remotely approximates the cost of investigating, apprehending, and prosecuting the Kurths, or that it roughly relates to any actual damages that they caused the State. And in any event, the formula by which Montana computed the tax assessment would have been the same regardless of the amount of the State's damages and, indeed, regardless of whether it suffered any harm at all.

This drug tax is not the kind of remedial sanction that may follow the first punishment of a criminal offense. Instead, it is a second punishment within the contemplation of a constitutional protection that has "deep roots in our history and jurisprudence," *Halper*, 490 U. S., at 440, and therefore must be imposed during the first prosecution or not at all. The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time "for the same offence."

The judgment of the Court of Appeals is affirmed.

It is so ordered.

CHIEF JUSTICE REHNQUIST, dissenting.

Without giving any indication that it is doing so, the Court's opinion drastically alters existing law. We have never previously subjected a tax statute to double jeopardy analysis, but under today's decision a state tax statute is struck down because its application violates double jeopardy. The Court starts off on the right foot. It correctly recognizes that our opinion in *United States* v. *Halper*, 490 U. S. 435 (1989), says nothing about the possible double jeopardy concerns of a tax, as opposed to a civil fine like the one confronted in *Halper*. *Ante*, at 777. I agree with the Court's rejection of the *Halper* mode of analysis, which, with its effort to determine whether a penalty statute is remedial or punitive, simply does not fit in the case of a tax statute. *Ante*, at 783. But the Court then goes astray and the end result of its decision is a hodgepodge of criteria—many of which have been squarely rejected by our previous decisions—to be used in deciding whether a tax statute qualifies as "punishment."

The Court cites the case of *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), as one in which a tax statute was subjected to double jeopardy analysis. But I agree with the Court's statement that the "penalty at issue in *Mitchell* is arguably better characterized as a sanction for fraud than a tax." *Ante*, at 779, n. 16.[1] All of our other cases in this area of

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[1] I disagree with the Court's statement that the *Mitchell* Court alternately characterized the penalty there in question as a tax. *Ante*, at 779, n. 16. The only language which was used by the *Mitchell* Court to which we are referred for this proposition is 303 U. S., at 398, where the Court uses the word "tax" three times, but only in the context of summarizing the parties' arguments. As for the first two times, the word "tax" is mentioned only in discussing the Government's argument that the indictment of Mitchell for willful evasion of the tax in question did not raise the same issue as did the civil proceeding for the fraud penalty for purposes of res judicata. The Court simply said:

"Since there was not even an adjudication that Mitchell did not wilfully attempt to evade or defeat the tax, it is not necessary to decide whether the law involved claims of double jeopardy where a statute imposing what was denominated a "civil penalty" was invoked following a separate criminal proceeding based on an indictment for fraud. In *Mitchell, supra, United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943), and *Rex Trailer Co.* v. *United States,* 350 U. S. 148 (1956), the double jeopardy claim was rejected; in *United States* v. *Halper, supra,* a double jeopardy claim was upheld for the first time.

The Court, unlike the Court of Appeals below, wisely does not subject the Montana tax to the *Halper* analysis and it is thus unnecessary to determine whether *Halper* was correctly decided. See *post,* at 802–805 (SCALIA, J., dissenting). This clearly is not the "rare case" contemplated by *Halper,* nor does this tax involve a "fixed-penalty provision." *Halper, supra,* at 449. In *Halper,* we held that the double jeopardy test was whether or not the penalty statute there enabled the Government to recover more than an approximation of its costs in bringing the fraudulent actor to book, because compensation for the Government's loss is the avowed purpose of a civil penalty statute. But here we are confronted with a tax statute, and the purpose of a tax statute is not to recover the costs incurred by the Government for bringing someone to book for some violation of law, but is instead either to raise revenue or to deter conduct, or both. See, *e. g., Welch* v. *Henry,* 305 U. S. 134, 146 (1938); *Sonzinsky* v. *United States,* 300 U. S. 506, 513 (1937). Thus, despite JUSTICE O'CONNOR's attempt to view this case through the *Halper* lens, *post,* at 793, the reasoning quite properly employed in *Halper* to decide whether the exaction was reme-

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such an adjudication would be decisive also of this issue of fraud." *Ibid.* The word "tax" is mentioned a third time in setting out the respondent's argument that "this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition . . . is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts." *Ibid.* It is telling to note that the Court immediately thereafter denotes the 50% addition as a "sanction," and not a tax. *Id.,* at 398–399.

dial or punitive simply does not work in the case of a tax statute. Tax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer's activities. *Commonwealth Edison Co.* v. *Montana,* 453 U. S. 609, 622 (1981). Thus, in analyzing the instant tax statute, the inquiry into the State's "damages caused by the [Kurths'] wrongful conduct," *post,* at 794 (O'CONNOR, J., dissenting), is unduly restrictive.

The proper question to be asked is whether the Montana drug tax constitutes a second punishment under the Double Jeopardy Clause for conduct already punished criminally. The Court asks the right question, *ante,* at 780, but reaches the wrong conclusion.

Taxes are customarily enacted to raise revenue to support the costs of government. Cf. *ante,* at 779–780 ("[T]axes are typically different [than fines, penalties, and forfeitures] because they are usually motivated by revenue-raising . . . purposes"). It is also firmly established that taxes may be enacted to deter or even suppress the taxed activity. Constitutional attacks on such laws have been regularly turned aside in our previous decisions. In *A. Magnano Co.* v. *Hamilton,* 292 U. S. 40 (1934), for example, the Court upheld against a due process challenge a steep excise tax imposed by the State of Washington on processors of oleomargarine during the depths of the depression. In *Sonzinsky* v. *United States, supra,* at 513, the Court upheld an annual federal firearms tax as a valid exercise of the taxing power of Congress. The Court there said "it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." In *United States* v. *Sanchez,* 340 U. S. 42 (1950), the Court upheld the former federal tax on marijuana at the rate of $100 per ounce against a challenge that the tax was a penalty, rather than a true tax. In so doing, the Court noted that "[i]t is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activity taxed." *Id.*, at 44. And, as the Court concedes, *ante*, at 778–779, it is well settled that the unlawfulness of an activity does not prevent its taxation. *Marchetti* v. *United States*, 390 U. S. 39, 44 (1968); *United States* v. *Constantine*, 296 U. S. 287, 293 (1935).

The Court's opinion today gives a passing nod to these cases, but proceeds to hold that a high tax rate and a deterrent purpose "lend support to the characterization of the drug tax as punishment." *Ante*, at 781. The Court then discusses "[o]ther unusual features" of the Montana tax which, it concludes, brands this tax as a criminal penalty.

The Court first points to its conclusion that the so-called tax is conditioned on the commission of a crime, *ibid.*, a conclusion that the State disputes, and for good reason. The relevant provision of the rule, Mont. Admin. Rule 42.34.102(1) (1988), which provides that the tax return "shall be filed within 72 hours of . . . arrest," merely acknowledges the practical realities involved in taxing an illegal activity.[2] Then, quite contrary to the teachings of *Marchetti*, *Constantine*, and *James* v. *United States*, 366 U. S. 213 (1961), the Court states that the justifications for mixed-motive taxes—imposed both to deter and to raise revenue—vanish "when the taxed activity is completely forbidden." *Ante*, at 782.

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[2] Other potential schemes for taxing illegal drug possession will face similar pitfalls. Because the activity sought to be taxed is illegal, individuals cannot be expected to voluntarily identify themselves as subject to the tax. The Minnesota scheme cited by respondents provides for the anonymous purchase of tax stamps prior to, and independent of, any criminal prosecution. Minn. Stat. §297D.01 *et seq.* (1992). Not surprisingly, when asked at oral argument "Does Minnesota collect any money off that scheme . . . Not too many stamps being sold?," counsel for respondents admitted, amidst laughter, that he did not know the answer. Tr. of Oral Arg. 41.

A second "unusual feature" identified by the Court is that the tax is levied on drugs that the taxpayer neither owns or possesses at the time of taxation. But here, the Court exalts form over substance. Surely the Court is not suggesting that the State must permit the Kurths to keep the contraband in order to tax its possession. Cf. *Constantine, supra,* at 293 ("It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law"). And although Montana's "Dangerous Drug Tax" is described as a tax on storage and possession, it is clear from the structure and purpose of the Act that it was passed for the legitimate purpose of raising revenue from the profitable underground drug business. 1987 Mont. Laws, ch. 563 (preamble).[3]

I do not dispute the Court's conclusion that an assessment which is labeled a "tax" could, under some conceivable circumstances, constitute "punishment" for purposes of the Double Jeopardy Clause. *Ante,* at 778, and n. 15, 779. The Court made a similar finding in *United States* v. *Constantine, supra,* although in the context of a different sort of challenge. At issue in that case was the validity of a special $1,000 excise tax levied against all persons dealing in the liquor business contrary to local law. *Id.,* at 289, n. 1. In striking down the tax as an unlawful penalty rather than a tax, the Court noted that the assessment was conditioned on the imposition of a crime, and that it was "highly exorbitant." *Id.,* at 295.

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[3] The preamble to the 1987 Montana Dangerous Drug Tax Act provides:

"WHEREAS, dangerous drugs are commodities having considerable value, and the existence in Montana of a large and profitable dangerous drug industry and expensive trade in dangerous drugs is irrefutable; and

"WHEREAS, the state does not endorse the manufacturing of or trading in dangerous drugs and does not consider the use of such drugs to be acceptable, but it recognizes the economic impact upon the state of the manufacturing and selling of dangerous drugs; and

"WHEREAS, it is appropriate that some of the revenue generated by this tax be devoted to continuing investigative efforts directed toward the identification, arrest, and prosecution of individuals involved in conducting illegal continuing criminal enterprises that affect the distribution of dangerous drugs in Montana.

"THEREFORE, the Legislature of the State of Montana does not wish to give credence to the notion that the manufacturing, selling, and use of dangerous drugs is legal or otherwise proper, but finds it appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses and to dispose of the tax proceeds through providing additional anticrime initiatives without burdening law abiding taxpayers."

Funds collected from the tax are earmarked for youth evaluations, chemical abuse assessment and aftercare, and juvenile detention facilities. Mont. Code Ann. § 15–25–122 (1993).

But the *Constantine* factors are not persuasive in the present context. As discussed above, I do not find the conditioning of the tax on criminal conduct and arrest to be fatal to this tax's validity; this characteristic simply reflects the reality of taxing an illegal enterprise. Furthermore, the rate of taxation clearly supports petitioner here. In *Constantine,* the special $1,000 excise tax on the sale of alcohol was 40 times as great when compared to the otherwise applicable $25 fee for retail liquor dealers such as respondent. *Ibid.* When compared to the Montana tax, two points are noteworthy. First, unlike the situation in *Constantine,* no tax or fee is otherwise collected from individuals engaged in the illicit drug business. Thus, an entire business goes without taxation. Second, the Montana tax is not as disproportionate as the additional excise tax in *Constantine.* The Court makes much of the fact that the bulk of the assessment—that imposed on the low-grade "shake"—was more than eight times the market value of the drug. *Ante,* at 780. But the Court glosses over the fact that the tax imposed on the higher quality "bud" amounted to only 80% of that product's market value.[4]

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[4] The Kurths were taxed for their possession of 130 ounces of marijuana "bud," a substance of higher quality than the marijuana "shake." The Bankruptcy Court found that the bud had a market value of approximately

After averaging the effective tax rates on the two marijuana products, the Court concludes that Montana's tax rate of four times the market value appears to be "unrivaled." *Ante*, at 780, n. 17. That may be so. But the proper inquiry is not whether the tax rate is "unrivaled," but whether it is so high that it can only be explained as serving a punitive purpose. When compared to similar types of "sin" taxes on items such as alcohol and cigarettes, these figures are not so high as to be deemed arbitrary or shocking. This is especially so given both the traditional deference accorded to state authorities regarding matters of taxation, and the fact that a substantial amount of the illegal drug business will escape taxation altogether.[5]

In short, I think the Court's conclusion that the tax here is a punishment is very much at odds with the purpose and effect of the Montana statute, as well as our previous decisions. After reviewing the structure and language of the tax provision and comparing the rate of taxation with similar types of sin taxes imposed on lawful products, I would reach the contrary conclusion—that the Montana tax has a nonpenal purpose of raising revenue, as well as the legitimate purpose of deterring conduct, such that it should be regarded as a genuine tax for double jeopardy purposes.

$2,000 per pound. The product was taxed at a minimum rate of $100 per ounce ($1,600 per pound), or 80% of market value.

[5] The federal tax on cigarettes is currently at 1.2 cents per cigarette, or 24 cents per package. 26 U. S. C. § 5701(b). While this does not exceed the cost of a pack of cigarettes, the current proposal to boost the cigarette tax to 99 cents per pack could lead to a total tax on cigarettes in some jurisdictions at a rate higher than the 80% rate utilized in this case for the marijuana bud. That the shake is taxed at a higher rate is consistent with the effect of a fixed rate tax on a very low-quality, inexpensive product. See 26 U. S. C. § 4131(b)(1) (fixed tax on vaccines, ranging from 6 cents to $4.56 per dose); 26 U. S. C. § 4681 (1988 ed., Supp. IV) (fixed tax on ozone-depleting chemicals).

JUSTICE O'CONNOR, dissenting.

In an attempt to save their ranch from creditors, the extended Kurth family turned to marijuana farming. "The business expanded to the largest marijuana growing operation in the State of Montana when shut down by law enforcement authorities in October, 1987." *In re Kurth Ranch,* 145 B. R. 61, 66 (Bkrtcy. Ct. Mont. 1990). The Kurths were convicted and sentenced on various state drug charges.

During the raid on the ranch, authorities found 1,811 ounces of harvested marijuana in the Kurths' possession. Under Montana law, "[t]here is a tax on the possession and storage of dangerous drugs," and "each person possessing or storing dangerous drugs is liable for the tax." Mont. Code Ann. § 15-25-111(1) (1987). In the case of marijuana, the tax is 10 percent of the market value of the drugs or $100 per ounce, whichever is greater. § 15-25-111(2). Pursuant to this law, the Montana Department of Revenue assessed a tax of $181,000 against the Kurths. The Kurths argue, and the courts below agreed, that this tax is a second punishment prohibited by the Double Jeopardy Clause. See *Schiro* v. *Farley,* 510 U. S. 222, 229 (1994) (the Clause "'protects against multiple punishments for the same offense,'" quoting *North Carolina* v. *Pearce,* 395 U. S. 711, 717 (1969)).

The government may, of course, tax illegal activity. See, *e. g., Marchetti* v. *United States,* 390 U. S. 39, 44 (1968). In fact, we have upheld, as within Congress' taxing authority, a $100 per ounce tax on marijuana. *United States* v. *Sanchez,* 340 U. S. 42, 44 (1950). But the power to tax illegal activity carries with it the danger that the legislature will use the tax to punish the participants for engaging in that activity. This is particularly true of taxes assessed on the possession of illegal drugs: Because most drug offenses involve the manufacture, possession, transportation, or distribution of controlled substances, the State might use a tax on possession to punish a participant in a drug crime twice for the same conduct. We would certainly examine a $100 per ounce *fine* levied against a person who had previously been convicted and sentenced for marijuana possession for consistency with the Double Jeopardy Clause. Cf. *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 548–549 (1943). Because in my view there is no constitutional distinction between such a fine and the tax at issue in this case, a tax imposed on the possession of illegal drugs is subject to double jeopardy analysis.

To hold, however, that Montana's drug tax is not *exempt* from scrutiny under the Double Jeopardy Clause says nothing about whether imposition of the tax is unconstitutional. "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely *punishing* twice, or attempting a second time to punish criminally, for the same offense." *Helvering* v. *Mitchell,* 303 U. S. 391, 399 (1938) (emphasis added). The Fifth Amendment says "nor shall any person be subject for the same offence to be twice put in jeopardy," and a civil proceeding following a criminal prosecution simply is not a second "jeopardy." See *post,* at 801, and n. 1 (SCALIA, J., dissenting). But we have recognized that the Constitution constrains the States' ability to denominate proceedings as "civil" and so dispense with the criminal procedure protections embodied in the Bill of Rights. See, *e. g.,* *Allen* v. *Illinois,* 478 U. S. 364, 368–369 (1986). Some governmental exactions are so punitive that they may only be imposed in a criminal proceeding. *United States* v. *Ward,* 448 U. S. 242, 248–249 (1980). And because the Double Jeopardy Clause prohibits successive criminal proceedings for the same offense, the government may not sanction a defendant for conduct for which he has already been punished *insofar as the subsequent sanction is punitive,* because to do so would necessitate a criminal proceeding prohibited by the Constitution. See generally *United States* v. *Halper,* 490 U. S. 435 (1989).

The question, then, is whether Montana's drug tax is punitive. Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective. *Id.,* at 448–450. See also *Bell* v. *Wolfish,* 441 U. S. 520, 539, n. 20 (1979); *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168 (1963). This will obtain when, as in *Halper,* the amount of the sanction is "overwhelmingly disproportionate" to the damages caused by the wrongful conduct and thus "is not rationally related to the goal of making the Government whole." 490 U. S., at 449, 451.

The State and Federal Governments spend vast sums on drug control activities. See, *e. g.,* U. S. Dept. of Justice, Bureau of Justice Statistics, Fact Sheet: Drug Data Summary 5 (Apr. 1994) (approximately $27 billion in fiscal year 1991). The Kurths are directly responsible for some of these expenditures—the costs of detecting, investigating, and raiding their operation, the price of prosecuting them and incarcerating those who received prison sentences, and part of the money spent on drug abuse education, deterrence, and treatment. The State of Montana has a legitimate nonpunitive interest in defraying the costs of such activities. *United States* v. *Halper, supra,* at 444–446, and n. 6; see also *United States* v. *Ward, supra,* at 254; *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 237 (1972); *Rex Trailer Co.* v. *United States,* 350 U. S. 148, 153–154 (1956). For example, readily available statistics indicate that apprehension, prosecution, and incarceration of the Kurths will cost the State of Montana at least $120,000. See Montana Board of Crime Control, Per-Unit and Per-Transaction Expenditures in the Montana Criminal Justice System 8, 15, 19, 21, 22–23, and Tables 21 and 23 (1993) (Montana Criminal Justice Expenditures).

But measuring the costs actually imposed by every participant in the illegal drug trade would be, to the extent it is even possible, so complex as to make the game not worth the candle. Thus, the government must resort to approximation—in effect, it exacts liquidated damages. See *Rex Trailer Co.* v. *United States, supra,* at 153–154 ("The damages resulting from [the government's] injury may be difficult or impossible to ascertain, but it is the function of liquidated damages to provide a measure of recovery in such circumstances"); *United States* v. *Halper, supra,* at 452–453 (KENNEDY, J., concurring) ("Our rule permits the imposition in the ordinary case of at least a fixed penalty roughly proportionate to the damage caused or a reasonably liquidated amount"). The Montana Legislature has determined that $100 per ounce of marijuana is an appropriate estimate of its costs of drug control, and at least 22 other States have made a similar determination and tax marijuana at approximately the same rate.*

The Court of Appeals recognized that imposition of the drug tax on the Kurths' possession of marijuana would not be punishment if the sanction bore some rational relationship to "the staggering costs associated with fighting drug abuse in this country." *In re Kurth Ranch,* 986 F. 2d 1308, 1312 (CA9 1993). But the court held that "allowing the state to impose this tax, *without any showing of some rough approximation of its actual damages and costs,* would be sanctioning a penalty which *Halper* prohibits." *Ibid.* (emphasis added). As evidenced by the highlighted phrase, the Court of Appeals skipped a step in the double jeopardy analysis. In *Halper,* we held that determining whether an exaction is punitive entails a two-part inquiry:

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*See Ala. Code § 40–17A–8(1) (1993); Colo. Rev. Stat. § 39–28.7–102(1) (Supp. 1993); Conn. Gen. Stat. § 12–651(b)(1) (1993); Ga. Code Ann. § 48–15–6(1) (Supp. 1993); Idaho Code § 63–4203(2)(a) (Supp. 1993); Ill. Comp. Stat. § 520/9(1) (1993); Iowa Code § 453B.7(1) (Supp. 1994); Kan. Stat. Ann. § 79–5202(a)(1) (Supp. 1990); La. Rev. Stat. Ann. § 47:2601(1) (West Supp. 1994); Me. Rev. Stat. Ann., Tit. 36, § 4434(1) (Supp. 1993); Mass. Gen. Laws ch. 64K, § 8(1) (Supp. 1994); Minn. Stat. § 297D.08(1) (1991); Neb. Rev. Stat. § 77–4303(1)(a) (1990); Nev. Rev. Stat. § 372A.070(b)(1) (1993); N. M. Stat. Ann. § 7–18A–3A(5) (1993); N. C. Gen. Stat. § 105–113.107(1) (1992); N. D. Cent. Code § 57–36.1–08(1) (1993); Okla. Stat., Tit. 68, § 450.2(1) (1992); R. I. Gen. Laws § 44–49–9(1) (Supp. 1993); Tex. Tax Code Ann. § 159.101(b)(2) (1992); Utah Code Ann. § 59–19–103(1)(a) (1992); Wis. Stat. § 139.88(1) (Supp. 1993).

> "Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, *then* the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought *in fact* constitutes a second punishment." 490 U. S., at 449–450 (emphasis added).

In other words, the defendant must first show the absence of a rational relationship between the amount of the sanction and the government's nonpunitive objectives; the burden then shifts to the government to justify the sanction with reference to the particular case. This bifurcated approach to the double jeopardy question makes good sense. The presumption of constitutionality to which every state statute is entitled means in this context that a sanction denominated as civil must be presumed to be nonpunitive. This presumption would be rendered nugatory if the government were required to prove that the sanction is in fact nonpunitive before imposing it in a particular case. Rather, the defendant must show that the sanction may be punitive as applied to him before the government can be required to justify its imposition. As we emphasized in *Halper,* it will be the "rare case" in which a litigant will succeed in satisfying the first prong of the constitutional analysis. *Id.,* at 449. We do not know whether this is such a case because the courts below improperly faulted the State for failing to prove its actual damages even though the Kurths have not shown that the amount of the tax is not rationally related to the government's legitimate nonpunitive objectives.

The Court avoids this problem by asserting that "[s]ubjecting Montana's drug tax to *Halper*'s test for civil penalties is . . . inappropriate." *Ante,* at 784. To reach this conclusion, the Court holds that imposition of the drug tax is *always* punitive, regardless of the nature of the offense or the offender. The consequences of this decision are astounding. The State of Montana—along with about half of the other States—is now precluded from *ever* imposing the drug tax on a person who has been punished for a possessory drug offense. A defendant who is arrested, tried, and convicted for possession of one ounce of marijuana cannot be taxed $100 therefor, even though the State's law enforcement costs in such a case average more than $4,000. See Montana Criminal Justice Expenditures 24. Moreover, presumably the State cannot tax *anyone* for possession of illegal drugs without providing the full panoply of criminal procedure protections found in the Fifth and Sixth Amendments, given the Court's holding that "[t]he proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution." *Ibid.* See *United States* v. *Ward,* 448 U. S., at 248; *post,* at 807 (SCALIA, J., dissenting).

Today's decision is entirely unnecessary to preserve individual liberty, because the Excessive Fines Clause is available to protect criminals from governmental overreaching. See *Alexander* v. *United States,* 509 U. S. 544 (1993); *Austin* v. *United States,* 509 U. S. 602 (1993); *post,* at 803, n. 2 (SCALIA, J., dissenting). See also *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.,* 492 U. S. 257, 283–284 (1989) (O'CONNOR, J., concurring in part and dissenting in part) (discussing incorporation of Excessive Fines Clause). On the other hand, today's decision will be felt acutely by law-abiding taxpayers, because it will seriously undermine the ability of the State and Federal Governments to collect recompense for the immense costs criminals impose on our society. I therefore respectfully dissent from the Court's unwarranted expansion of our double jeopardy jurisprudence. I would simply vacate the judgment below and remand the case for further proceedings consistent with this opinion and *Halper.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

I

"To be put in jeopardy" does not remotely mean "to be punished," so by its terms this provision prohibits, not multiple punishments, but only multiple prosecutions. Compare the proposal of the House of Representatives, for which the Senate substituted language similar to the current text of the Clause: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." See 1 Annals of Cong. 434, 753, 767 (1789); Senate Journal, Aug. 24, 1789, 1st Cong., 1st Sess., 105, 119, 130 (1789). The view that the Double Jeopardy Clause does not prohibit multiple punishments is, as Justice Frankfurter observed,

> "confirmed by history. For legislation . . . providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress. . . . It would do violence to proper regard for the framers of the Fifth Amendment to assume that they contemporaneously enacted and continued to enact legislation that was offensive to the guarantees of the double jeopardy clause

which they had proposed for ratification." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 555–556 (1943) (concurring opinion).

The belief that there is a multiple-punishments component of the Double Jeopardy Clause can be traced to *Ex parte Lange*, 18 Wall. 163 (1874). In that case, the lower court sentenced Lange to both one year of imprisonment *and* a $200 fine for stealing mail bags from the Post Office, under a statute that authorized a maximum sentence of one year of imprisonment *or* a fine not to exceed $200. The Court, acknowledging that the sentence was in excess of statutory authorization, issued a writ of habeas corpus. *Lange* has since been cited as though it were decided exclusively on the basis of the Double Jeopardy Clause, see, *e. g., North Carolina* v. *Pearce*, 395 U. S. 711, 717, and n. 11 (1969); in fact, Justice Miller's opinion for the Court rested the decision on principles of the common law, and both the Due Process and Double Jeopardy Clauses of the Fifth Amendment. See *Lange*, 18 Wall., at 170, 176, 178. The opinion went out of its way *not* to rely exclusively on the Double Jeopardy Clause, in order to avoid deciding whether it applied to prosecutions not literally involving "life or limb." See *id.*, at 170. It is clear that the Due Process Clause alone suffices to support the decision, since the guarantee of the process provided by the law of the land, cf. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U. S. 1, 28–29 (1991) (SCALIA, J., concurring in judgment), assures prior legislative authorization for whatever punishment is imposed.

The basis for *Lange* was hardly clarified when, almost three-quarters of a century later and in a case involving nearly identical circumstances (a prisoner who had already paid a $500 fine was sentenced to prison under a contempt statute that permitted only a fine *or* imprisonment), the Court discharged the prisoner without express reference to the Double Jeopardy Clause and with only a citation of *Lange*. See *In re Bradley*, 318 U. S. 50, 51–52 (1943). Chief

Justice Stone's dissent in *Bradley* displays his uncertainty regarding the doctrinal basis for *Lange*—as well as his view that if the basis was the Double Jeopardy Clause it was wrong: "So far as *Ex parte Lange* is regarded here as resting on the ground that it would be double jeopardy to compel the offender to serve the prison sentence after remission of the fine on the same day on which it was paid, I think its authority should be reexamined and rejected." 318 U. S., at 53.

Between *Lange* and our decision five Terms ago in *United States* v. *Halper,* 490 U. S. 435 (1989), our cases often stated that the Double Jeopardy Clause protects against both successive prosecutions and successive punishments for the same criminal offense. See, *e. g., North Carolina* v. *Pearce, supra,* at 717; *Illinois* v. *Vitale,* 447 U. S. 410, 415 (1980); *Ohio* v. *Johnson,* 467 U. S. 493, 498–499 (1984). But the repetition of a dictum does not turn it into a holding, and an examination of the cases discussing the prohibition against multiple punishments demonstrates that, until *Halper,* the Court never invalidated a *legislatively authorized* successive punishment. The dispositions were entirely consistent with the proposition that the restriction derived exclusively from the due process requirement of legislative authorization. Indeed, some cases expressed the restriction in precisely that fashion. See, *e. g., Johnson, supra,* at 499, and n. 8 ("[P]rotection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *Albernaz* v. *United States,* 450 U. S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *United States* v. *DiFrancesco,* 449 U. S. 117, 139 (1980) ("No double jeopardy problem would have been presented in *Ex parte Lange* if Congress had provided that the offense there was punishable by both fine and imprisonment, even though that is multiple punishment"); *Whalen* v. *United States,* 445 U. S. 684, 688 (1980) ("[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized"); *id.*, at 697 (BLACKMUN, J., concurring in judgment) ("The *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended") (emphasis in original); *Brown* v. *Ohio,* 432 U. S. 161, 165 (1977) ("The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments").

To tell the truth, however, until *Halper* was decided, extending the "no-double-punishments" rule to *civil* penalties, it did not much matter whether that rule was a freestanding constitutional prohibition implicit in the Double Jeopardy Clause or (as I think to be the case) merely an aspect of the Due Process Clause requirement of legislative authorization. Even if it were thought to be the former, the Double Jeopardy Clause's ban on successive criminal prosecutions would make surplusage of any distinct protection against additional punishment imposed in a *successive prosecution,* since the prosecution *itself* would be barred.[1] (It has never been imagined, of course, that the commonplace practice of imposing multiple authorized punishments—fine and incarceration—after a *single* prosecution is unconstitutional. See

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[1] Thus, in the context of criminal proceedings, legislatively authorized multiple punishments are permissible if imposed in a single proceeding, but impermissible if imposed in successive proceedings. See *Missouri* v. *Hunter,* 459 U. S. 359, 368–369 (1983). *United States* v. *Halper,* 490 U. S. 435, 450 (1989), and the Court's opinion in the present case, see *ante,* at 778, attempt to preserve that distinction in the context of civil proceedings. But of course the textual basis for it—the Double Jeopardy Clause's prohibition of successive prosecutions—does not exist: a civil proceeding is not a second jeopardy. See *infra,* at 807–808.

DiFrancesco, supra, at 139.) But a *civil* proceeding successive to a criminal prosecution is *not* barred, even if (as in *Halper* itself) it has the potential to result in the imposition of a penalty. See *United States* v. *One Assortment of 89 Firearms,* 465 U. S. 354, 362 (1984); *One Lot Emerald Cut Stones* v. *United States,* 409 U. S. 232, 235 (1972). Thus, by extending the no-double-punishments rule to civil penalties, while simultaneously affirming that it demanded more than mere fidelity to legislative intent, *Halper* gave the rule a breadth of effect it had never before enjoyed.

Halper involved a medical doctor who had already been convicted and punished under the criminal false claims statute, 18 U. S. C. § 287, for filing false medicare claims. The issue was whether he could then be fined for the same false claims under the civil provisions of the False Claims Act, 31 U. S. C. §§ 3729–3731. We held that the Double Jeopardy Clause prevented it, to the extent that the fine exceeded what was needed to cover "'legitimate nonpunitive governmental objectives,'" *Halper,* 490 U. S., at 448, quoting *Bell* v. *Wolfish,* 441 U. S. 520, 539, n. 20 (1979). The Government's contention in *Halper* was not that no constitutional prohibition on multiple punishments existed, but rather that it applied only to punishments meted out in a criminal proceeding. See Brief for United States in *United States* v. *Halper,* O. T. 1988, No. 87–1383, pp. 11–12, 21–24. I found, and continue to find, that distinction incoherent: if the Constitution prohibits multiple punishments, the nature of the proceeding in which punishment is imposed should make no difference. Accordingly, I joined the Court's unanimous opinion. I continued to apply the rule of *Halper*—indeed, I thought I applied it more faithfully than the Court—in my dissent the next month in *Jones* v. *Thomas,* 491 U. S. 376, 388, 393 (1989).

The difficulty of applying *Halper*'s analysis to Montana's Dangerous Drug Tax has prompted me to focus on the antecedent question whether there *is* a multiple-punishments component of the Double Jeopardy Clause. As indicated above, I have concluded—as did Chief Justice Stone, see *In re Bradley,* 318 U. S. 50 (1943), and Justice Frankfurter, see *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537 (1943)—that there is not. Instead, the Due Process Clause keeps punishment within the bounds established by the legislature, and the Cruel and Unusual Punishments and Excessive Fines Clauses place substantive limits upon what those legislated bounds may be.[2]

Of course the conviction that *Halper* was in error is not alone enough to justify departing from it. But there is added to that conviction the knowledge, acquired from brief experience with the new regime, that the erroneous holding produces results too strange for judges to endure, and regularly demands judgments of the most problematic sort. As to the latter: We dodged the bullet in *Halper*—or perhaps a more precise metaphor would be that we thrust our lower-court colleagues between us and the bullet—by leaving it to the lower courts to determine at what particular dollar level the civil fine exceeded the Government's "legitimate nonpunitive governmental objectives" and thus became a penalty. See *Halper,* 490 U. S., at 452. In the present case, however, the alleged punishment is not an adjudicated fine that can be judicially reduced to a lower level, but rather a tax; and so we grapple with the different, though no less peculiar, inquiry: When is a tax so high (or so something-else) that it is a punishment? Surely further enigmas await us.

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[2] The Excessive Fines Clause—which was rescued from obscurity only after *Halper* was decided, see *Alexander* v. *United States,* 509 U. S. 544, 558–559 (1993) (first Supreme Court case applying the Clause to *in personam* criminal proceedings); *Austin* v. *United States,* 509 U. S. 602, 606–618 (1993) (Clause applies to civil forfeitures)—may well support the judgment in *Halper.* Indeed, it may even *explain* the judgment in *Halper,* since much of the language of that opinion suggests that the Court was motivated by concern for the harsh consequences of applying a per-transaction penalty to a "prolific but small-gauge offender," 490 U. S., at 449.

And we have also learned from experience that we are unwilling to take the strong (and not particularly healthful) medicine that we poured out for ourselves in *Halper*. *Jones* was the first lesson, but even sterner ones are in store. In the present case, as in *Halper* itself, we confront the relatively easy task of disallowing a *civil* sanction because *criminal* punishment has already been imposed. But many cases, including one being held for this case, will demand much more of us: disallowing *criminal* punishment because a *civil* sanction has already been imposed. Although at least one lower court has optimistically suggested (without elaborating) that there might be a constitutional difference between the two situations, see *United States* v. *Newby*, 11 F. 3d 1143 (CA3 1993), if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference. Accord, *United States* v. *Sanchez-Escareno*, 950 F. 2d 193, 200 (CA5 1991). The social cost of vindicating the fictional, *Halper*-created multiple-punishments prohibition will be much higher when criminal penalties are at stake, and we will be no more willing to pay it (nor should we) than the lower courts have been. Can a prison inmate who has been disciplined for an altercation with a guard subsequently be punished criminally for the same incident? See *Newby, supra,* at 1145–1146 (answering yes). Can a person who has paid a $75,000 fine and been permanently disbarred from commodity trading because of trading violations subsequently be sent to jail for the same violations? See *United States* v. *Furlett*, 974 F. 2d 839 (CA7 1992) (answering yes). Can a person who has suffered civil forfeiture for violation of law later be prosecuted criminally for the same violation? See *United States* v. *Tilley*, 18 F. 3d 295 (CA5 1994) (answering yes).

It is time to put the *Halper* genie back in the bottle, and to acknowledge what the text of the Constitution makes perfectly clear: the Double Jeopardy Clause prohibits successive prosecution, not successive punishment. Multiple punishment is of course restricted by the Cruel and Unusual Punishments Clause insofar as its nature is concerned, and by the Excessive Fines Clause insofar as its cumulative extent is concerned. Its multiplicity *qua* multiplicity, however, is restricted only by the Double Jeopardy Clause's requirement that there be no successive criminal prosecution, and by the Due Process Clause's requirement that the cumulative punishments be in accord with the law of the land, *i. e.*, authorized by the legislature.

II

The Court's entire opinion appears to proceed on the assumption that the relevant question is whether taxes assessed pursuant to Montana's Dangerous Drug Tax Act "violate the constitutional prohibition against successive punishments for the same offense." *Ante*, at 769. Nonetheless, after 16 pages addressing how Montana's marijuana tax inflicts punishment, the Court adds, almost as an afterthought: "The proceeding Montana initiated to collect a tax on the possession of drugs was the functional equivalent of a successive criminal prosecution that placed the Kurths in jeopardy a second time 'for the same offence.'" *Ante*, at 784.

The only conceivable foundation for that statement is the implicit assumption that any proceeding which imposes "punishment" within the meaning of the multiple-punishments component of the Double Jeopardy Clause is a criminal prosecution. That assumption parts company with a long line of cases, including *Halper*, without even the courtesy of a goodbye. Although a few of our cases include statements to the effect that a proceeding in which punishment is imposed is criminal, see, *e. g.*, *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 167 (1963), the criterion of "punishment" for *that* purpose is significantly different (and significantly more deferential to the government) than the criterion applied in

Halper. *United States* v. *Ward,* 448 U. S. 242 (1980), put it this way:

> "[W]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.'" *Id.,* at 248–249, quoting *Flemming* v. *Nestor,* 363 U. S. 603, 617 (1960) (citation omitted).

Halper's focus on whether the sanction serves the goals of "retribution and deterrence" is just one factor in the *Kennedy-Ward* test, see 372 U. S., at 168–169, and one factor alone is not dispositive, see *Ward, supra,* at 250–251.

The greater severity of the "criminal prosecution" test is in fact precisely why *Halper* resorted to the multiple-punishments component of the Double Jeopardy Clause. The opinion distinguished between the test used to determine "whether proceedings are criminal or civil," 490 U. S., at 447, and the more searching analysis thought appropriate in the multiple-punishments context:

> "The Government correctly observes that this Court has followed this abstract *[Kennedy-Ward]* approach when determining whether the procedural protections of the Sixth Amendment apply to proceedings under a given statute, in affixing the appropriate standard of proof for such proceedings, and in determining whether double jeopardy protections should be applied. See *United States* v. *Ward,* 448 U. S., at 248–251. But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general

> matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments." *Ibid.*

The Court not only ignores the *Kennedy-Ward* test and this portion of *Halper*, it also does not attempt to reconcile its conclusion with our decision in *Helvering* v. *Mitchell*, 303 U. S. 391 (1938):

> "Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible *[sic]* by civil proceedings since the original revenue law of 1789. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions." *Id.*, at 400 (citation omitted) (citing cases).

Of course, if the Court were correct that the proceeding below was criminal in nature, there would be no particular reason to refer to this as a double jeopardy case. Assessment of a criminal punishment in a civil tax proceeding would violate not only the Double Jeopardy Clause, but all of the criminal-procedure guarantees of the Fifth and Sixth Amendments. And it would be invalid *whether or not* it was preceded by a traditional criminal prosecution. The Court's assertion that it would be lawful in isolation, see *ante*, at 778–779, thus contradicts the Court's contention that it is "the functional equivalent of a . . . criminal prosecution," *ante*, at 784.

* * *

Applying the *Kennedy-Ward* test to the Montana tax proceeding, I do not find that it constituted a second criminal prosecution. And since the Montana Legislature authorized these taxes *in addition to* the criminal penalties for possession of marijuana, these taxes did not violate that principle of due process sometimes called the multiple-punishments component of the Double Jeopardy Clause. The Constitution requires nothing more. For these reasons, I respectfully dissent.

KEY TRONIC CORP. *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93–376. Argued March 29, 1994—Decided June 6, 1994

Petitioner Key Tronic Corporation, one of several parties responsible for contaminating a landfill, settled a lawsuit filed by the Environmental Protection Agency (EPA) and then brought this action against the Air Force and other responsible parties to recover a share of its cleanup costs, including attorney's fees for legal services in connection with (1) the identification of other potentially responsible parties (PRP's), (2) the preparation and negotiation of the settlement agreement with the EPA, and (3) the prosecution of this litigation. The District Court held, *inter alia*, that all of the attorney's fees were recoverable under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA). The Court of Appeals disagreed as to each type of fees and reversed.

Held: CERCLA § 107 does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action. Pp. 814–821.

(a) Under the longstanding "American rule," attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization. See, *e. g., Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240. The relevant provisions of CERCLA do not expressly mention the recovery of such fees, although § 107(a)(4)(B) imposes private liability for the "necessary costs of response" to the release of a hazardous substance, while § 101(25), as amended by SARA, defines "response" to include "enforcement activities." Pp. 814–816.

(b) The fees for prosecuting this action against the Air Force are not recoverable "necessary costs of response" under § 107(a)(4)(B) because the "enforcement activities" included in § 101(25) do not encompass a private party's action to recover cleanup costs from other PRP's. First, although § 107 unquestionably provides such a cause of action, that cause is not explicitly set out in the section's text, but was inferred in numerous District Court cases interpreting the statute. To conclude that a provision that only impliedly authorizes suit nonetheless provides for attorney's fees with the clarity required by *Alyeska* would be unprecedented. Second, Congress' inclusion of two express fee awards provisions elsewhere in the SARA amendments, and its omission of a similar provision either in § 107 or in § 113, which expressly authorizes contribution claims, strongly suggest a deliberate decision not to authorize such awards in the kind of private cost recovery action that is at issue. Third, it would stretch the plain terms of the phrase "enforcement activities" too far to construe it as encompassing such an action. Pp. 816–819.

(c) Unlike litigation-related fees, the component of Key Tronic's claim covering activities performed in identifying other PRP's constitutes a "necessary cos[t] of response" recoverable under § 107(a)(4)(B). Such work might well be performed by engineers, chemists, private investigators, or other professionals who are not lawyers, and fees for its performance are clearly distinguishable from litigation expenses governed by the American rule under *Alyeska.* The District Court recognized the role such efforts played in uncovering the Air Force's disposal of wastes at the site and in prompting the EPA to initiate enforcement action against the Air Force. Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. Key Tronic is therefore quite right to claim that these activities significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. Pp. 819–820.

(d) However, fees for the legal services performed in connection with the negotiations between Key Tronic and the EPA that culminated in the consent decree do not constitute "necessary costs of response." Although studies that Key Tronic's counsel prepared or supervised during those negotiations may indeed have aided the EPA and may also have affected the cleanup's ultimate scope and form, such work must be viewed as primarily protecting Key Tronic's interests as a defendant in the proceedings that established the extent of its liability. Pp. 820–821.

984 F. 2d 1025, affirmed in part, reversed in part, and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion dissenting in part, in which BLACKMUN and THOMAS, JJ., joined, *post,* p. 821.

Mark W. Schneider argued the cause for petitioner. With him on the briefs were *James R. Moore, Michael Himes,* and *Kathryn L. Tucker.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the briefs were *Solicitor General Days, Acting Assistant Attorney General Schiffer,* *Ronald J. Mann, Anne S. Almy, David C. Shilton,* and *M. Alice Thurston.**

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Key Tronic Corporation, one of several parties responsible for contaminating a landfill, brought this action to recover a share of its cleanup costs from other responsible parties. The question presented is whether attorney's fees are "necessary costs of response" within the meaning of § 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), 100 Stat. 1613, and therefore recoverable in such an action.

I

During the 1970's Key Tronic and other parties, including the United States Air Force, disposed of liquid chemicals at the Colbert Landfill in eastern Washington State. In 1980 the Washington Department of Ecology (WDOE) determined that the water supply in the surrounding area had been contaminated by these chemicals. Various lawsuits ensued, including formal proceedings against Key Tronic, the Air Force, and other parties.

Two of those proceedings were settled. In one settlement with WDOE and the Environmental Protection Agency (EPA), Key Tronic agreed to contribute $4.2 million to an EPA cleanup fund. In the other, the Air Force agreed to pay the EPA $1.45 million. The EPA subsequently released the Air Force from further liability pursuant to CERCLA § 122(g)(5), 42 U. S. C. § 9622(g)(5), which provides that a party that has resolved its liability to the United States shall not be liable for contribution claims regarding matters addressed in the settlement.[1]

**Rex E. Lee, Carter G. Phillips, Janet M. Letson, Larry G. Gutterridge,* and *James M. Harris* filed a brief for Atlantic Richfield Co. as *amicus curiae* urging reversal.

Michael D. Graves and *Claire V. Eagan* filed a brief for the Sand Springs Superfund PRP Group as *amicus curiae* urging affirmance.

Key Tronic thereafter brought this action against the United States and other parties seeking to recover part of its $4.2 million commitment to the EPA in a contribution claim under CERCLA § 113(f), 42 U. S. C. § 9613(f), and seeking an additional $1.2 million for response costs that it incurred before the settlements in a cost recovery claim under CERCLA § 107(a)(4)(B), 42 U. S. C. § 9607(a)(4)(B). The $1.2 million included attorney's fees for three types of legal services: (1) the identification of other potentially responsible parties (PRP's), including the Air Force, that were liable for the cleanup; (2) preparation and negotiation of its agreement with the EPA; and (3) the prosecution of this litigation.[2]

The District Court dismissed Key Tronic's $4.2 million contribution claim against the Air Force when Key Tronic conceded that § 122(g)(5) precluded it from recovering any part of the consent decree obligation.[3] Key Tronic's claim for $1.2 million of additional response costs could be pursued under CERCLA § 107(a)(4)(B), 42 U. S. C. § 9607, the court held, because it related to matters not covered by the Air

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[1] See Administrative Order on Consent and Interagency Agreement ¶ 8, p. 12 (Record, Doc. No. 23, Exh. 1). Paragraph 7(a) of that agreement defines the term "Covered Matters" to include "any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to sections 106 or 107(a) of CERCLA, 42 U. S. C. 9606 or 9607(a), or section 7003 of the Resource Conservation and Recovery Act, as amended, 42 U. S. C. 6973, with regard to the Site."

[2] Key Tronic also sought prejudgment interest against the United States. The District Court awarded such interest, and the Air Force did not appeal that award. Other payments the Air Force made to Key Tronic are not in dispute.

[3] The statutory bar protected only the Air Force from liability. Key Tronic's claim against another defendant, Alumax Fabricated Products, Inc., and Alumax Mill Products, Inc. (collectively Alumax), was deemed moot when the two parties settled. 766 F. Supp. 865, 867–868 (ED Wash. 1991).

Force's settlement with the EPA. 766 F. Supp. 865, 868 (ED Wash. 1991). Section 107(a) provides that responsible parties are liable for "any . . . necessary costs of response incurred by any other person consistent with the national contingency plan."[4] 42 U. S. C. § 9607(a)(4)(B). CERCLA's definitional § 101(25), as amended by SARA, provides that "response" or "respond" "means remove, removal, remedy, and remedial action" and that "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U. S. C. § 9601(25). Construing §§ 107 and 101(25) "liberally to achieve the overall objectives of the statute," 766 F. Supp., at 872, the District Court concluded that a private party may incur enforcement costs and that such costs include attorney's fees for bringing a cost recovery action under § 107. *Id.*, at 871. The court went on to decide that attorney's fees encompassed within Key Tronic's PRP search costs also were recoverable as an enforcement activity under CERCLA, *id.*, at 872, and that the costs Key Tronic's attorneys incurred in negotiating the agreement with the EPA were recoverable as necessary response costs under § 107.[5]

The Court of Appeals reversed. 984 F. 2d 1025, 1028 (CA9 1993). Relying on its decision in *Stanton Road Associates* v. *Lohrey Enterprises*, 984 F. 2d 1015 (CA9 1993), which prohibited a litigant in a private response cost recovery action from obtaining attorney's fees from a party responsible for the pollution, the court held that the District Court lacked authority to award attorney's fees in this case. 984 F. 2d, at 1027. The court concluded that *Stanton Road* likewise precluded an award of attorney's fees for Key Tronic's search for other responsible parties and for negotiating the consent decree. "Because Congress has not explicitly authorized private litigants to recover their legal expenses incurred in a private cost recovery action," the District Court's award of attorney's fees could not stand. 984 F. 2d, at 1028. Judge Canby dissented, reasoning that Congress' 1986 amendment of the definition of "response" meant to authorize the recovery of attorney's fees even in private litigants' cost recovery actions. *Ibid.*

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[4] The EPA promulgated the national contingency plan as a regulation pursuant to CERCLA § 105, 42 U. S. C. § 9605. It is codified at 40 CFR pt. 300 (1993).

[5] The court indicated that these expenses were necessary response costs within the meaning of § 107(a)(4)(B) regardless of whether they constituted costs of "'enforcement activities'" under § 101(25). 766 F. Supp., at 872.

Other courts addressing this question have differed over the extent to which attorney's fees are a necessary cost of response under CERCLA. See *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.*, 920 F. 2d 1415 (CA8 1990) (fees recoverable); *Donahey* v. *Bogle,* 987 F. 2d 1250, 1256 (CA6 1993) (same); *Juniper Development Group* v. *Kahn,* 993 F. 2d 915, 933 (CA1 1993) (litigation fees not recoverable); *FMC Corp.* v. *Aero Industries, Inc.*, 998 F. 2d 842 (CA10 1993) (only nonlitigation fees may be recoverable). We granted certiorari to resolve the conflict. 510 U. S. 1023 (1993).

II

As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites. Sections 104 and 106 provide the framework for federal abatement and enforcement actions that the President, the EPA as his delegated agent, or the Attorney General initiates. 42 U. S. C. §§ 9604, 9606. These actions typically require private parties to incur substantial costs in removing hazardous wastes and responding to hazardous conditions. Section 107 sets forth the scope of the liabilities that may be imposed on private parties and the defenses that they may assert. 42 U. S. C. § 9607.

Our cases establish that attorney's fees generally are not a recoverable cost of litigation "absent explicit congressional authorization." *Runyon* v. *McCrary,* 427 U. S. 160, 185

(1976) (citing *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S. 240, 247 (1975)). Recognition of the availability of attorney's fees therefore requires a determination that "Congress intended to set aside this longstanding American rule of law." *Runyon,* 427 U. S., at 185–186. Neither CERCLA § 107, the liabilities and defenses provision, nor § 113, which authorizes contribution claims, expressly mentions the recovery of attorney's fees. The absence of specific reference to attorney's fees is not dispositive if the statute otherwise evinces an intent to provide for such fees. The Eighth Circuit, for example, found "a sufficient degree of explicitness" in CERCLA's references to "necessary costs of response" and "enforcement activities" to warrant the award of attorney's fees and expenses.[6] Mere "generalized commands," however, will not suffice to authorize such fees. *Id.,* at 186.

The three components of Key Tronic's claim for attorney's fees raise somewhat different issues. We first consider whether the fees for prosecuting this action against the Air Force are recoverable under CERCLA. That depends, again, upon whether the "enforcement activities" included in § 101(25)'s definition of "response" encompass a private party's action to recover cleanup costs from other PRP's such that the attorney's fees associated with that action are then "necessary costs of response" within § 107(a)(4)(B).

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[6] See *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.,* 920 F. 2d 1415, 1421–1422 (1990). After setting out the relevant language of §§ 107(a)(4)(B) and 101(25), the court concluded that a private party cost-recovery action is an enforcement activity within the meaning of the statute, that attorney's fees "necessarily are incurred in this kind of enforcement activity," and that "it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." *Ibid.* The court's subsequent conclusion that CERCLA authorizes private parties to recover attorney's fees was "based on the statutory language" and was "consistent with two of the main purposes of CERCLA—prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party." *Id.,* at 1422.

III

The 1986 amendments to CERCLA are the genesis of the term "enforcement activities"; we begin, therefore, by considering the statutory basis for the claim in the original CERCLA enactment and the SARA provisions' effect on it. In its original form CERCLA contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other PRP's. In numerous cases, however, District Courts interpreted the statute—particularly the § 107 provisions outlining the liabilities and defenses of persons against whom the Government may assert claims—to impliedly authorize such a cause of action.[7]

The 1986 amendments included a provision—CERCLA § 113(f)—that expressly created a cause of action for contribution. See 42 U. S. C. § 9613(f). Other SARA provisions, moreover, appeared to endorse the judicial decisions recognizing a cause of action under § 107 by presupposing that such an action existed. An amendment to § 107 itself, for example, refers to "amounts recoverable in an action under this section." 42 U. S. C. § 9607(a)(4)(D). The new contribution section also contains a reference to a "civil action . . . under section 9607(a)." 42 U. S. C. § 9613(f)(1). Thus the statute now expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107.

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[7] In *Walls* v. *Waste Resource Corp.*, 761 F. 2d 311 (CA6 1985), Judge Merritt noted that District Courts "have been virtually unanimous" in holding that § 107(a)(4)(B) creates a private right of action for the recovery of necessary response costs. *Id.*, at 318 (citing *Bulk Distribution Centers, Inc.* v. *Monsanto Co.*, 589 F. Supp. 1437, 1442–1444 (SD Fla. 1984); *Jones* v. *Inmont Corp.*, 584 F. Supp. 1425, 1428 (SD Ohio 1984); *Philadelphia* v. *Stepan Chemical Co.*, 544 F. Supp. 1135 (ED Pa. 1982); *Pinole Point Properties, Inc.* v. *Bethlehem Steel Corp.*, 596 F. Supp. 283, 293 (ND Cal. 1984)).

As we have said, neither § 107 nor § 113 expressly calls for the recovery of attorney's fees by the prevailing party. In contrast, two SARA provisions contain explicit authority for the award of attorney's fees. A new provision authorizing private citizens to bring suit to enforce the statute, see 100 Stat. 1704–1705, expressly authorizes the award of "reasonable attorney and expert witness fees" to the prevailing party. 42 U. S. C. § 9659(f). And an amendment to the section authorizing the Attorney General to bring abatement actions provides that a person erroneously ordered to pay response costs may in some circumstances recover counsel fees from the Government. See § 9606(b)(2)(E).[8] Since its enactment CERCLA also has expressly authorized the recovery of fees in actions brought by employees claiming discriminatory treatment based on their disclosure of statutory violations. See § 9610(c) ("aggregate amount of all costs and expenses (including the attorney's fees)" is recoverable).

Judicial decisions, rather than explicit statutory text, also resolved an issue that arose frequently under the original version of CERCLA—that is, whether the award in a government enforcement action seeking to recover cleanup costs could encompass its litigation expenses, including attorney's fees. Here, too, District Courts generally agreed that such fees were recoverable.[9] Congress arguably endorsed these holdings, as well, in the SARA provision redefining the term "response" to include related "enforcement activities," 100

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[8] Under this section, the reimbursement that a court awards "may include appropriate costs, fees, and other expenses" in accordance with 28 U. S. C. §§ 2412(a) and (d), which outline the procedures by which costs and fees are awarded. Section 2412(d)(2)(A), in particular, defines "fees and other expenses" to include reasonable attorney's fees.

[9] See, *e. g., United States* v. *South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (S. C. 1984), aff'd in part and vacated in part, 858 F. 2d 160 (CA4 1988), cert. denied, 490 U. S. 1106 (1989); *United States* v. *Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (WD Mo. 1984) (same), aff'd in part and rev'd in part, 810 F. 2d 726 (CA8 1986), cert. denied, 484 U. S. 848 (1987).

Stat. 1615.[10] Key Tronic contends that a private action under § 107 is one of the enforcement activities covered by that definition and that fees should therefore be available in private litigation as well as in government actions.

For three reasons, we are unpersuaded. First, although § 107 unquestionably provides a cause of action for private parties to seek recovery of cleanup costs, that cause of action is not explicitly set out in the text of the statute.[11] To conclude that a provision that only impliedly authorizes suit nonetheless provides for attorney's fees with the clarity required by *Alyeska* would be unusual if not unprecedented. Indeed, none of our cases has authorized fee awards to prevailing parties in such circumstances.

Second, Congress included two express provisions for fee awards in SARA without including a similar provision in either § 113, which expressly authorizes contribution claims, or in § 107, which impliedly authorizes private parties to recover cleanup costs from other PRP's. These omissions strongly suggest a deliberate decision not to authorize such awards.

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[10] According to the House Committee Report on this amendment, § 101(25)'s modification of the definition of "response action" to include related enforcement activities "will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H. R. Rep. No. 99-253, pp. 66-67 (1985).

[11] JUSTICE SCALIA correctly notes that "to say that A shall be liable to B is the *express* creation of a right of action." *Post,* at 822. Section 107, however, merely says that "A shall be liable" without revealing *to whom* A is liable. Sections 104 and 106 plainly indicate that the parties described in § 107 are liable to the Government. The statute thus expressly identifies the Government as a potential plaintiff and only impliedly identifies private parties as the hypothetical B in § 107 litigation. That § 107 imposes liability on A for costs incurred "by any other person" *implies*—but does not expressly command—that A may have a claim for contribution against those treated as joint tortfeasors. Cf. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.,* 451 U. S. 630, 639-640 (1981) (finding no implied right to contribution from other participants in conspiracy violative of antitrust laws); *Northwest Airlines, Inc.* v. *Transport Workers,* 451 U. S. 77, 91-95 (1981) (finding no implied right to contribution under the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964).

Third, we believe it would stretch the plain terms of the phrase "enforcement activities" too far to construe it as encompassing the kind of private cost recovery action at issue in this case. Though we offer no comment on the extent to which that phrase forms the basis for the Government's recovery of attorney's fees through § 107, the term "enforcement activity" is not sufficiently explicit to embody a private action under § 107 to recover cleanup costs.[12] Given our adherence to a general practice of not awarding fees to a prevailing party absent explicit statutory authority, *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U. S., at 262, we conclude that CERCLA § 107 does not provide for the award of private litigants' attorney's fees associated with bringing a cost recovery action.[13]

IV

The conclusion we reach with respect to litigation-related fees does not signify that all payments that happen to be made to a lawyer are unrecoverable expenses under CERCLA. On the contrary, some lawyers' work that is closely tied to the actual cleanup may constitute a necessary cost of response in and of itself under the terms of § 107(a)(4)(B). The component of Key Tronic's claim that covers the work performed in identifying other PRP's falls in this category. Unlike the litigation services at issue in *Alyeska,* these efforts might well be performed by engineers, chemists, private investigators, or other professionals who are not lawyers. As the Tenth Circuit observed, the American rule set out in *Alyeska* does not govern such fees "because they are not incurred in pursuing litigation." *FMC Corp.* v. *Aero Industries, Inc.*, 998 F. 2d 842, 847 (1993).

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[12] That characterization undeniably applies to citizen suits brought by private parties under § 310 seeking affirmative relief. Significantly, Congress expressly authorized fee awards in such cases. See 42 U. S. C. § 9659(f).

[13] In concluding that a private party may not recover attorney's fees arising from the litigation of a private recovery action, the Tenth Circuit observed: "We simply cannot agree with those courts that find an explicit authorization for the award of litigation fees from the fact that response costs include related enforcement activities. We recognize that CERCLA is designed to encourage private parties to assume the financial responsibility of cleanup by allowing them to seek recovery from others. It may be true that awarding the litigation fees incurred in that recovery would further this goal. Nonetheless, the efficacy of an exception to the American rule is a policy decision that must be made by Congress, not the courts. The desirability of a fee-shifting provision cannot substitute for the express authorization mandated by the Supreme Court." *FMC Corp* v. *Aero Industries, Inc.*, 998 F. 2d 842, 847 (1993) (citing *Alyeska,* 421 U. S., at 263–264).

The District Court in this case recognized the role Key Tronic's search for other responsible parties played in uncovering the Air Force's disposal of wastes at the site and in prompting the EPA to initiate its enforcement action against the Air Force. 766 F. Supp., at 872, n. 4. Tracking down other responsible solvent polluters increases the probability that a cleanup will be effective and get paid for. Key Tronic is therefore quite right to claim that such efforts significantly benefited the entire cleanup effort and served a statutory purpose apart from the reallocation of costs. These kinds of activities are recoverable costs of response clearly distinguishable from litigation expenses.[14]

This reasoning does not extend, however, to the legal services performed in connection with the negotiations between Key Tronic and the EPA that culminated in the consent decree. Studies that Key Tronic's counsel prepared or supervised during those negotiations may indeed have aided the EPA and may also have affected the ultimate scope and form of the cleanup. We nevertheless view such work as primarily protecting Key Tronic's interests as a defendant in the proceedings that established the extent of its liability. As such, these services do not constitute "necessary costs of response" and are not recoverable under CERCLA.

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[14] As is customary in assessments of this sort, of course, trial courts will determine the exact amount of these costs that is recoverable.

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE BLACKMUN and JUSTICE THOMAS join, dissenting in part.

I disagree with the Court's conclusion that a private litigant cannot recover the attorney's fees associated with bringing a cost recovery action under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U. S. C. § 9607. Under §§ 107(a)(4)(A) and (B), a party who has incurred costs to clean up a hazardous waste site can recover those costs from any other party liable under CERCLA. Those provisions state that:

> "Covered persons . . . shall be liable for—
>
> "(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> "(B) *any other necessary costs of response incurred by any other person* consistent with the national contingency plan." (Emphases added.)

Title 42 U. S. C. § 9601(25) explains that:

> "The terms '*respond*' or '*response*' means *[sic]* remove, removal, remedy, and remedial action; *all such terms* (including the terms 'removal' and 'remedial action') *include enforcement activities related thereto.*" (Emphases added; footnote omitted.)

Under the plain language of these provisions, a private litigant is entitled to the costs associated with bringing a § 107(a)(4)(B) cost recovery action, which is the only "enforcement activit[y]" he can conceivably conduct. Obviously, attorney's fees will constitute the major portion of those enforcement costs.

The Court seeks to characterize the right of recovery created by § 107 as an "implied" right of action, see *ante,* at 816, 818, and n. 11—perhaps in order to support the view that the authorization of attorney's fees included within that right of action is not explicit (a point I shall discuss more fully below). That characterization is mistaken. Section 107(a)(4)(B) states, as clearly as can be, that "[c]overed persons . . . shall be liable for . . . necessary costs of response incurred by any other person." Surely to say that A shall be liable to B is the *express* creation of a right of action.* Moreover, other language in § 107 of CERCLA refers to "amounts recoverable in an action under this section," 42 U. S. C. § 9607(a)(4)(D), and language in § 113 discusses the "civil action . . . under section 9607(a) [*i. e.,* § 107(a) of CERCLA]," 42 U. S. C. § 9613(f)(1). The Court's assumption seems to be that only a statute that uses the very term "cause of action" can create an "express" cause of action, and that all other causes of action are "implied." That is not ordinary usage. An implied cause of action is something quite different from what we have here. See, *e. g., Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A., ante,* at 171 (discussing the genesis of the implied private causes of action under §§ 10(b) and 14(a) of the Securities and Exchange Act of 1934).

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*I cannot agree with JUSTICE STEVENS's contention that CERCLA "expressly identifies the Government as a potential plaintiff and only impliedly identifies private parties" as potential plaintiffs in § 107 litigation. *Ante,* at 818, n. 11. Section 107(a)(4)(A) states that persons are liable for certain costs "incurred by the United States Government or a State or an Indian Tribe," thus providing an express cause of action for those plaintiffs. Section 107(a)(4)(B) states that persons are liable for certain costs "incurred by *any other person*" (emphasis added), thus providing an express cause of action for private parties.

The first of the three reasons the Court gives for refusing to read §§ 9607(a)(4)(B) and 9601(25) to cover attorney's fees displays the same confusion between a requirement of explicitness and a requirement of a password. The Court states that "attorney's fees generally are not . . . recoverable . . . 'absent explicit congressional authorization,'" *ante*, at 814 (quoting *Runyon* v. *McCrary*, 427 U. S. 160, 185 (1976), and notes further that none of the statutory provisions at issue "expressly mentions the recovery of attorney's fees," *ante*, at 815. But to meet the demands of *Runyon*, Congress need only be explicit—it need not incant the magic phrase "attorney's fees." Where, as here, Congress has explicitly authorized recovery of costs of "enforcement activities," and where, as here, the costs of "enforcement activities" naturally (and indeed primarily) include attorney's fees, that textual authorization satisfies *Runyon*.

The Court also draws a negative inference from the fact that Congress expressly provided for attorney's fee awards in other portions of the Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1613, the Act that added the "enforcement activities" language of 42 U. S. C. § 9601(25). From this, the Court concludes that Congress's failure to mention attorney's fees in § 9607 or § 9613 "strongly suggest[s] a deliberate decision not to authorize such awards." *Ante*, at 819. That argument would be persuasive if it were ambiguous whether, for a private party, the cost of "enforcement activities" includes attorney's fees. But since it is not, the fact that Congress provided for the recovery of attorney's fees *eo nomine* in two other sections is of little relevance. Given the explicitness of the award of costs of "enforcement activities," the "'attorney's fees' was used elsewhere" argument is simply a watered-down version of the "magic words" argument rejected above.

Finally, the Court comes to grips with the core issue in this case, declaring that "it would stretch the plain terms of the phrase 'enforcement activities' too far to construe it as encompassing the kind of private cost recovery action at issue in this case." *Ibid.* I do not agree. While the term "enforcement" often—perhaps even usually—is used in connection with government prosecution, that is assuredly not the only form of legal action it refers to. It clearly includes the assertion of a valid private claim against another private litigant. Lawyers regularly speak of "enforceable obligations" and "enforceable contracts," and of "enforcing" a private judgment. We have called the private rights of action created by the Clayton Act "vehicle[s] for private enforcement" of the law, *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U. S. 104, 109 (1986), and the "private enforcement" characterization seems especially apt here, where the plaintiff's suit must be "consistent with the national contingency plan" promulgated by the Environmental Protection Agency. 42 U. S. C. § 9607(a)(4)(B). As I read the Court's opinion, it interprets "enforcement activities" to cover, *at most*, the *government's* attorney's fees in a cost recovery action. See *ante*, at 819. That gives the specification of § 9601(25) that certain terms include "enforcement activities" *no* application to private parties, and *no* application to any terms *except* "removal" and "remedial action"—which is very curious, since the parenthetical in § 9601(25) suggests that those two terms, far from being central to the provision (much less an embodiment of its total application), were in danger of being overlooked.

I would read "enforcement activities" in § 9601(25) to cover the attorney's fees incurred by both the government and private plaintiffs successfully seeking cost recovery under § 9607 of CERCLA.

FARMER *v.* BRENNAN, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 92-7247. Argued January 12, 1994—Decided June 6, 1994

Petitioner, a preoperative transsexual who projects feminine characteristics, has been incarcerated with other males in the federal prison system, sometimes in the general prison population but more often in segregation. Petitioner claims to have been beaten and raped by another inmate after being transferred by respondent federal prison officials from a correctional institute to a penitentiary—typically a higher security facility with more troublesome prisoners—and placed in its general population. Filing an action under *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, petitioner sought damages and an injunction barring future confinement in any penitentiary, and alleged that respondents had acted with "deliberate indifference" to petitioner's safety in violation of the Eighth Amendment because they knew that the penitentiary had a violent environment and a history of inmate assaults and that petitioner would be particularly vulnerable to sexual attack. The District Court granted summary judgment to respondents, denying petitioner's motion under Federal Rule of Civil Procedure 56(f) to delay its ruling until respondents complied with a discovery request. It concluded that failure to prevent inmate assaults violates the Eighth Amendment only if prison officials were "reckless in a criminal sense," *i. e.,* had "actual knowledge" of a potential danger, and that respondents lacked such knowledge because petitioner never expressed any safety concerns to them. The Court of Appeals affirmed.

Held:

1. A prison official may be held liable under the Eighth Amendment for acting with "deliberate indifference" to inmate health or safety only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it. Pp. 832-851.

(a) Prison officials have a duty under the Eighth Amendment to provide humane conditions of confinement. They must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must protect prisoners from violence at the hands of other prisoners. However, a constitutional violation occurs only where the deprivation alleged is, objectively, "sufficiently serious," *Wilson* v. *Seiter,* 501 U. S.

294, 298, and the official has acted with "deliberate indifference" to inmate health or safety. Pp. 832–834.

(b) Deliberate indifference entails something more than negligence, but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. Thus, it is the equivalent of acting recklessly. However, this does not establish the level of culpability deliberate indifference entails, for the term recklessness is not self-defining, and can take subjective or objective forms. Pp. 835–837.

(c) Subjective recklessness, as used in the criminal law, is the appropriate test for "deliberate indifference." Permitting a finding of recklessness only when a person has disregarded a risk of harm of which he was aware is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in this Court's cases. The Eighth Amendment outlaws cruel and unusual "punishments," not "conditions," and the failure to alleviate a significant risk that an official should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment under the Court's cases. Petitioner's invitation to adopt a purely objective test for determining liability—whether the risk is known or should have been known—is rejected. This Court's cases "mandate inquiry into a prison official's state of mind," *id.*, at 299, and it is no accident that the Court has repeatedly said that the Eighth Amendment has a "subjective component." Pp. 837–840.

(d) The subjective test does not permit liability to be premised on obviousness or constructive notice. *Canton* v. *Harris*, 489 U. S. 378, distinguished. However, this does not mean that prison officials will be free to ignore obvious dangers to inmates. Whether an official had the requisite knowledge is a question of fact subject to demonstration in the usual ways, and a factfinder may conclude that the official knew of a substantial risk from the very fact that it was obvious. Nor may an official escape liability by showing that he knew of the risk but did not think that the complainant was especially likely to be assaulted by the prisoner who committed the act. It does not matter whether the risk came from a particular source or whether a prisoner faced the risk for reasons personal to him or because all prisoners in his situation faced the risk. But prison officials may not be held liable if they prove that they were unaware of even an obvious risk or if they responded reasonably to a known risk, even if the harm ultimately was not averted. Pp. 840–845.

(e) Use of a subjective test will not foreclose prospective injunctive relief, nor require a prisoner to suffer physical injury before obtaining prospective relief. The subjective test adopted today is consistent with the principle that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia*, 262 U. S. 553. In a suit for prospective relief, the subjective factor, deliberate indifference, "should be determined in light of the prison authorities' current attitudes and conduct," *Helling* v. *McKinney*, 509 U. S. 25, 36: their attitudes and conduct at the time suit is brought and persisting thereafter. In making the requisite showing of subjective culpability, the prisoner may rely on developments that postdate the pleadings and pretrial motions, as prison officials may rely on such developments to show that the prisoner is not entitled to an injunction. A court that finds the Eighth Amendment's objective and subjective requirements satisfied may grant appropriate injunctive relief, though it should approach issuance of injunctions with the usual caution. A court need not ignore a prisoner's failure to take advantage of adequate prison procedures to resolve inmate grievances, and may compel a prisoner to pursue them. Pp. 845–847.

2. On remand, the District Court must reconsider its denial of petitioner's Rule 56(f) discovery motion and apply the Eighth Amendment principles explained herein. The court may have erred in placing decisive weight on petitioner's failure to notify respondents of a danger, and such error may have affected the court's ruling on the discovery motion, so that additional evidence may be available to petitioner. Neither of two of respondents' contentions—that some of the officials had no knowledge about the confinement conditions and thus were alleged to be liable only for the transfer, and that there is no present threat that petitioner will be placed in a penitentiary—is so clearly correct as to justify affirmance. Pp. 848–851.

Vacated and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, SCALIA, KENNEDY, and GINSBURG, JJ., joined. BLACKMUN, J., *post*, p. 851, and STEVENS, J., *post*, p. 858, filed concurring opinions. THOMAS, J., filed an opinion concurring in the judgment, *post*, p. 858.

Elizabeth Alexander argued the cause for petitioner. With her on the briefs were *Alvin J. Bronstein*, by appointment of the Court, 510 U. S. 941, and *Steven R. Shapiro.*

Deputy Solicitor General Bender argued the cause for respondents. With him on the brief were *Solicitor General*

Days, Assistant Attorney General Hunger, Amy L. Wax, Barbara L. Herwig, and *Robert M. Loeb.*[*]

JUSTICE SOUTER delivered the opinion of the Court.

A prison official's "deliberate indifference" to a substantial risk of serious harm to an inmate violates the Eighth Amendment. See *Helling* v. *McKinney* 509 U. S. 25 (1993); *Wilson* v. *Seiter,* 501 U. S. 294 (1991); *Estelle* v. *Gamble,* 429

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[*] Briefs of *amici curiae* urging reversal were filed for the Montana Defender Project by *Jeffrey T. Renz;* for the D. C. Prisoners' Legal Services Project, Inc., by *Alan A. Pemberton* and *Jonathan M. Smith;* and for Stop Prisoner Rape by *Frank M. Dunbaugh.*

J. Joseph Curran, Jr., Attorney General of Maryland, and *Andrew H. Baida,* Assistant Attorney General, filed a brief for the State of Maryland et al. as *amici curiae* urging affirmance, joined by the Attorneys General and other officials for their respective States as follows: *Jimmy Evans,* Attorney General of Alabama, *Charles E. Cole,* Attorney General of Alaska, *Grant Woods,* Attorney General of Arizona, *Winston Bryant,* Attorney General of Arkansas, *Daniel E. Lungren,* Attorney General of California, *Charles M. Oberly III,* Attorney General of Delaware, *Michael J. Bowers,* Attorney General of Georgia, *Robert A. Marks,* Attorney General of Hawaii, *Pamela Carter,* Attorney General of Indiana, *Robert T. Stephan,* Attorney General of Kansas, *Chris Gorman,* Attorney General of Kentucky, *Scott Harshbarger,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Hubert H. Humphrey III,* Attorney General of Minnesota, *Mike Moore,* Attorney General of Mississippi, *Jay Nixon,* Attorney General of Missouri, *Don Stenberg,* Attorney General of Nebraska, *Frankie Sue Del Papa,* Attorney General of Nevada, *Jeffrey R. Howard,* Attorney General of New Hampshire, *Fred DeVesa,* Acting Attorney General of New Jersey, *Michael F. Easley,* Attorney General of North Carolina, *Heidi Heitkamp,* Attorney General of North Dakota, *Lee Fisher,* Attorney General of Ohio, *Susan B. Loving,* Attorney General of Oklahoma, *Theodore R. Kulongoski,* Attorney General of Oregon, *Ernest D. Preate, Jr.,* Attorney General of Pennsylvania, *T. Travis Medlock,* Attorney General of South Carolina, *Mark Barnett,* Attorney General of South Dakota, *Charles W. Burson,* Attorney General of Tennessee, *Jan Graham,* Attorney General of Utah, *Jeffrey L. Amestoy,* Attorney General of Vermont, *Stephen D. Rosenthal,* Attorney General of Virginia, *James E. Doyle,* Attorney General of Wisconsin, and *Joseph B. Meyer,* Attorney General of Wyoming.

U. S. 97 (1976). This case requires us to define the term "deliberate indifference," as we do by requiring a showing that the official was subjectively aware of the risk.

I

The dispute before us stems from a civil suit brought by petitioner, Dee Farmer, alleging that respondents, federal prison officials, violated the Eighth Amendment by their deliberate indifference to petitioner's safety. Petitioner, who is serving a federal sentence for credit card fraud, has been diagnosed by medical personnel of the Bureau of Prisons as a transsexual, one who has "[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex," and who typically seeks medical treatment, including hormonal therapy and surgery, to bring about a permanent sex change. American Medical Association, Encyclopedia of Medicine 1006 (1989); see also American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 74–75 (3d rev. ed. 1987). For several years before being convicted and sentenced in 1986 at the age of 18, petitioner, who is biologically male, wore women's clothing (as petitioner did at the 1986 trial), underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful "black market" testicle-removal surgery. See *Farmer* v. *Haas*, 990 F. 2d 319, 320 (CA7 1993). Petitioner's precise appearance in prison is unclear from the record before us, but petitioner claims to have continued hormonal treatment while incarcerated by using drugs smuggled into prison, and apparently wears clothing in a feminine manner, as by displaying a shirt "off one shoulder," App. 112. The parties agree that petitioner "projects feminine characteristics." *Id.*, at 51, 74.

The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex, see *Farmer* v. *Haas, supra*, at 320, and over time authorities housed petitioner in several federal facilities, sometimes in the general male prison population but more often in segregation. While there is no dispute that petitioner was segregated at least several times because of violations of prison rules, neither is it disputed that in at least one penitentiary petitioner was segregated because of safety concerns. See *Farmer* v. *Carlson,* 685 F. Supp. 1335, 1342 (MD Pa. 1988).

On March 9, 1989, petitioner was transferred for disciplinary reasons from the Federal Correctional Institute in Oxford, Wisconsin (FCI-Oxford), to the United States Penitentiary in Terre Haute, Indiana (USP-Terre Haute). Though the record before us is unclear about the security designations of the two prisons in 1989, penitentiaries are typically higher security facilities that house more troublesome prisoners than federal correctional institutes. See generally Federal Bureau of Prisons, Facilities 1990. After an initial stay in administrative segregation, petitioner was placed in the USP-Terre Haute general population. Petitioner voiced no objection to any prison official about the transfer to the penitentiary or to placement in its general population. Within two weeks, according to petitioner's allegations, petitioner was beaten and raped by another inmate in petitioner's cell. Several days later, after petitioner claims to have reported the incident, officials returned petitioner to segregation to await, according to respondents, a hearing about petitioner's HIV-positive status.

Acting without counsel, petitioner then filed a *Bivens* complaint, alleging a violation of the Eighth Amendment. See *Bivens* v. *Six Unknown Fed. Narcotics Agents,* 403 U. S. 388 (1971); *Carlson* v. *Green,* 446 U. S. 14 (1980). As defendants, petitioner named respondents: the warden of USP-Terre Haute and the Director of the Bureau of Prisons (sued only in their official capacities); the warden of FCI-Oxford and a case manager there; and the Director of the Bureau of Prisons North Central Region Office and an official in that office (sued in their official and personal capacities). As later amended, the complaint alleged that respondents either transferred petitioner to USP-Terre Haute or placed petitioner in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that petitioner, as a transsexual who "projects feminine characteristics," would be particularly vulnerable to sexual attack by some USP-Terre Haute inmates. This allegedly amounted to a deliberately indifferent failure to protect petitioner's safety, and thus to a violation of petitioner's Eighth Amendment rights. Petitioner sought compensatory and punitive damages, and an injunction barring future confinement in any penitentiary, including USP-Terre Haute.[1]

Respondents filed a motion for summary judgment supported by several affidavits, to which petitioner responded with an opposing affidavit and a cross-motion for summary judgment; petitioner also invoked Federal Rule of Civil Procedure 56(f), asking the court to delay its ruling until respondents had complied with petitioner's pending request for production of documents. Respondents then moved for a protective order staying discovery until resolution of the issue of qualified immunity, raised in respondents' summary judgment motion.

Without ruling on respondents' request to stay discovery, the District Court denied petitioner's Rule 56(f) motion and granted summary judgment to respondents, concluding that there had been no deliberate indifference to petitioner's safety. The failure of prison officials to prevent inmate assaults violates the Eighth Amendment, the court stated, only if prison officials were "reckless in a criminal sense," meaning that they had "actual knowledge" of a potential danger. App. 124. Respondents, however, lacked the requisite knowledge, the court found. "[Petitioner] never expressed any concern for his safety to any of [respondents]. Since [respondents] had no knowledge of any potential danger to [petitioner], they were not deliberately indifferent to his safety." *Ibid.*

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[1] Petitioner also sought an order requiring the Bureau of Prisons to place petitioner in a "co-correctional facility" (*i. e.*, one separately housing male and female prisoners but allowing coeducational programming). Petitioner tells us, however, that the Bureau no longer operates such facilities, and petitioner apparently no longer seeks this relief.

The United States Court of Appeals for the Seventh Circuit summarily affirmed without opinion. We granted certiorari, 510 U. S. 811 (1993), because Courts of Appeals had adopted inconsistent tests for "deliberate indifference." Compare, for example, *McGill* v. *Duckworth,* 944 F. 2d 344, 348 (CA7 1991) (holding that "deliberate indifference" requires a "subjective standard of recklessness"), cert. denied, 503 U. S. 907 (1992), with *Young* v. *Quinlan,* 960 F. 2d 351, 360–361 (CA3 1992) ("[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate").

II

A

The Constitution "does not mandate comfortable prisons," *Rhodes* v. *Chapman,* 452 U. S. 337, 349 (1981), but neither does it permit inhumane ones, and it is now settled that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment," *Helling,* 509 U. S., at 31. In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. See *Hudson* v. *McMillian,* 503 U. S. 1 (1992). The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates," *Hudson* v. *Palmer,* 468 U. S. 517, 526–527 (1984). See *Helling, supra,* at 31–32; *Washington* v. *Harper,* 494 U. S. 210, 225 (1990); *Estelle,* 429 U. S., at 103. Cf. *DeShaney* v. *Winnebago County Dept. of Social Servs.,* 489 U. S. 189, 198–199 (1989).

In particular, as the lower courts have uniformly held, and as we have assumed, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." *Cortes-Quinones* v. *Jimenez-Nettleship,* 842 F. 2d 556, 558 (CA1) (internal quotation marks and citation omitted), cert. denied, 488 U. S. 823 (1988);[2] see also *Wilson* v. *Seiter,* 501 U. S., at 303 (describing "the protection [an inmate] is afforded against other inmates" as a "conditio[n] of confinement" subject to the strictures of the Eighth Amendment). Having incarcerated "persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct," *Hudson* v. *Palmer, supra,* at 526, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Cf. *DeShaney, supra,* at 199–200; *Estelle, supra,* at 103–104. Prison conditions may be "restrictive and even harsh," *Rhodes, supra,* at 347, but gratuitously allowing the beating or rape of one prisoner by another serves no "legitimate penological objectiv[e]," *Hudson* v. *Palmer, supra,* at 548 (STEVENS, J., concurring in part and dissenting in part), any more than it squares with "'evolving standards of decency,'" *Estelle,*

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[2] Other Court of Appeals decisions to the same effect include *Villante* v. *Department of Corrections,* 786 F. 2d 516, 519 (CA2 1986); *Young* v. *Quinlan,* 960 F. 2d 351, 361–362 (CA3 1992); *Pressly* v. *Hutto,* 816 F. 2d 977, 979 (CA4 1987); *Alberti* v. *Klevenhagen,* 790 F. 2d 1220, 1224 (CA5 1986); *Roland* v. *Johnson,* 856 F. 2d 764, 769 (CA6 1988); *Goka* v. *Bobbitt,* 862 F. 2d 646, 649–650 (CA7 1988); *Martin* v. *White,* 742 F. 2d 469, 474 (CA8 1984); *Berg* v. *Kincheloe,* 794 F. 2d 457, 459 (CA9 1986); *Ramos* v. *Lamm,* 639 F. 2d 559, 572 (CA10 1980); *LaMarca* v. *Turner,* 995 F. 2d 1526, 1535 (CA11 1993); and *Morgan* v. *District of Columbia,* 824 F. 2d 1049, 1057 (CADC 1987).

supra, at 102 (quoting *Trop* v. *Dulles,* 356 U. S. 86, 101 (1958) (plurality opinion)). Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society." *Rhodes, supra,* at 347.

It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious," *Wilson, supra,* at 298; see also *Hudson* v. *McMillian, supra,* at 5; a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities," *Rhodes, supra,* at 347. For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. See *Helling, supra,* at 35.[3]

The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Wilson,* 501 U. S., at 297 (internal quotation marks, emphasis, and citations omitted). To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficiently culpable state of mind." *Ibid.;* see also *id.,* at 302–303; *Hudson* v. *McMillian, supra,* at 8. In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety, *Wilson, supra,* at 302–303; see also *Helling, supra,* at 34–35; *Hudson* v. *McMillian, supra,* at 5; *Estelle, supra,* at 106, a standard the parties agree governs the claim in this case. The parties disagree, however, on the proper test for deliberate indifference, which we must therefore undertake to define.

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[3] At what point a risk of inmate assault becomes sufficiently substantial for Eighth Amendment purposes is a question this case does not present, and we do not address it.

B

1

Although we have never paused to explain the meaning of the term "deliberate indifference," the case law is instructive. The term first appeared in the United States Reports in *Estelle* v. *Gamble*, 429 U. S., at 104, and its use there shows that deliberate indifference describes a state of mind more blameworthy than negligence. In considering the inmate's claim in *Estelle* that inadequate prison medical care violated the Cruel and Unusual Punishments Clause, we distinguished "deliberate indifference to serious medical needs of prisoners," *ibid.*, from "negligen[ce] in diagnosing or treating a medical condition," *id.*, at 106, holding that only the former violates the Clause. We have since read *Estelle* for the proposition that Eighth Amendment liability requires "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley* v. *Albers*, 475 U. S. 312, 319 (1986).

While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result. That point underlies the ruling that "application of the deliberate indifference standard is inappropriate" in one class of prison cases: when "officials stand accused of using excessive physical force." *Hudson* v. *McMillian*, 503 U. S., at 6–7; see also *Whitley*, *supra*, at 320. In such situations, where the decisions of prison officials are typically made "'in haste, under pressure, and frequently without the luxury of a second chance,'" *Hudson* v. *McMillian*, *supra*, at 6 (quoting *Whitley*, *supra*, at 320), an Eighth Amendment claimant must show more than "indifference," deliberate or otherwise. The claimant must show that officials applied force "maliciously and sadistically for the very purpose of causing harm," 503 U. S., at 6 (internal quotation marks and citations omitted), or, as the Court also put it, that officials used force with "a knowing willingness that [harm] occur," *id.*, at 7 (internal quotation marks and citation omitted). This standard of purposeful or knowing conduct is not, however, necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement; "the very high state of mind prescribed by *Whitley* does not apply to prison conditions cases." *Wilson, supra,* at 302–303.

With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.[4] See, *e. g., LaMarca* v. *Turner,* 995 F. 2d 1526, 1535 (CA11 1993); *Manarite* v. *Springfield,* 957 F. 2d 953, 957 (CA1 1992); *Redman* v. *County of San Diego,* 942 F. 2d 1435, 1443 (CA9 1991); *McGill* v. *Duckworth,* 944 F. 2d, at 347; *Miltier* v. *Beorn,* 896 F. 2d 848, 851–852 (CA4 1990); *Martin* v. *White,* 742 F. 2d 469, 474 (CA8 1984); see also *Springfield* v. *Kibbe,* 480 U. S. 257, 269 (1987) (O'CONNOR, J., dissenting). It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.

That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails, for the term recklessness is not self-defining. The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. See Prosser and Keeton § 34, pp. 213–214; Restatement (Second) of Torts § 500 (1965). The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware. See R. Perkins & R. Boyce, Criminal Law 850–851 (3d ed. 1982); J. Hall, General Principles of Criminal Law 115–116, 120, 128 (2d ed. 1960) (hereinafter Hall); American Law Institute, Model Penal Code § 2.02(2)(c), and Comment 3 (1985); but see *Commonwealth* v. *Pierce,* 138 Mass. 165, 175–178 (1884) (Holmes, J.) (adopting an objective approach to criminal recklessness). The standards proposed by the parties in this case track the two approaches (though the parties do not put it that way): petitioner asks us to define deliberate indifference as what we have called civil-law recklessness,[5] and respondents urge us to adopt an approach consistent with recklessness in the criminal law.[6]

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[4] Between the poles lies "gross negligence" too, but the term is a "nebulous" one, in practice typically meaning little different from recklessness as generally understood in the civil law (which we discuss later in the text). See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 34, p. 212 (5th ed. 1984) (hereinafter Prosser and Keeton).

We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. See Prosser and Keeton §§2, 34, pp. 6, 213–214; see also Federal Tort Claims Act, 28 U. S. C. §§2671–2680; *United States* v. *Muniz,* 374 U. S. 150 (1963). But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.

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[5] See Reply Brief for Petitioner 5 (suggesting that a prison official is deliberately indifferent if he "knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law"); see also Brief for Petitioner 20–21.

[6] See Brief for Respondents 16 (asserting that deliberate indifference requires that a prison "official must know of the risk of harm to which an inmate is exposed").

In *Wilson* v. *Seiter,* we rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions. See 501 U. S., at 299–302. As we explained there, our "cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment." *Id.,* at 299. Although "state of mind," like "intent," is an ambiguous term that can encompass objectively defined levels of blameworthiness, see 1 W. LaFave & A. Scott, Substantive Criminal Law §§3.4, 3.5, pp. 296–300, 313–314 (1986) (hereinafter LaFave & Scott); *United States* v. *Bailey,* 444 U. S. 394, 404 (1980), it was no accident that we said in *Wilson* and repeated in later cases that Eighth Amendment suits against prison officials must satisfy a "subjective" requirement. See *Wilson, supra,* at 298; see also *Helling,* 509 U. S., at 35; *Hudson* v. *McMillian,* 503 U. S., at 8. It is true, as petitioner points out, that *Wilson* cited with approval Court of Appeals decisions applying an objective test for deliberate indifference to claims based on prison officials' failure to prevent inmate assaults. See 501 U. S., at 303 (citing *Cortes-Quinones* v. *Jimenez-Nettleship,* 842 F. 2d, at 560; and *Morgan* v. *District of Columbia,* 824 F. 2d 1049, 1057–1058 (CADC 1987)). But *Wilson* cited those cases for the proposition that the deliberate indifference standard applies to all prison-conditions claims, not to undo its holding that the

Eighth Amendment has a "subjective component." 501 U. S., at 298. Petitioner's purely objective test for deliberate indifference is simply incompatible with *Wilson*'s holding.

To be sure, the reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted. But the result is the same: to act recklessly in either setting a person must "consciously disregar[d]" a substantial risk of serious harm. Model Penal Code § 2.02(2)(c).

At oral argument, the Deputy Solicitor General advised against frank adoption of a criminal-law *mens rea* requirement, contending that it could encourage triers of fact to find Eighth Amendment liability only if they concluded that prison officials acted like criminals. See Tr. of Oral Arg. 39–40. We think this concern is misdirected. *Bivens* actions against federal prison officials (and their 42 U. S. C. § 1983 counterparts against state officials) are civil in character, and a court should no more allude to the criminal law when enforcing the Cruel and Unusual Punishments Clause than when applying the Free Speech and Press Clauses, where we have also adopted a subjective approach to recklessness. See *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U. S. 657, 688 (1989) (holding that the standard for "reckless disregard" for the truth in a defamation action by a public figure "is a subjective one," requiring that "the defendant in fact entertained serious doubts as to the truth of his publication," or that "the defendant actually had a high degree of awareness of . . . probable falsity") (internal quotation marks and citations omitted).[7] That said, subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for "deliberate indifference" under the Eighth Amendment.

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[7] Appropriate allusions to the criminal law would, of course, be proper during criminal prosecutions under, for example, 18 U. S. C. § 242, which sets criminal penalties for deprivations of rights under color of law.

2

Our decision that Eighth Amendment liability requires consciousness of a risk is thus based on the Constitution and our cases, not merely on a parsing of the phrase "deliberate indifference." And we do not reject petitioner's arguments for a thoroughly objective approach to deliberate indifference without recognizing that on the crucial point (whether a prison official must know of a risk, or whether it suffices that he should know) the term does not speak with certainty. Use of "deliberate," for example, arguably requires nothing more than an act (or omission) of indifference to a serious risk that is voluntary, not accidental. Cf. *Estelle*, 429 U. S., at 105 (distinguishing "deliberate indifference" from "accident" or "inadverten[ce]"). And even if "deliberate" is better read as implying knowledge of a risk, the concept of constructive knowledge is familiar enough that the term "deliberate indifference" would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness.

Because "deliberate indifference" is a judicial gloss, appearing neither in the Constitution nor in a statute, we could not accept petitioner's argument that the test for "deliberate indifference" described in *Canton* v. *Harris*, 489 U. S. 378 (1989), must necessarily govern here. In *Canton*, interpreting Rev. Stat. § 1979, 42 U. S. C. § 1983, we held that a municipality can be liable for failure to train its employees when the municipality's failure shows "a deliberate indifference to the rights of its inhabitants." 489 U. S., at 389 (internal quotation marks omitted). In speaking to the meaning of the term, we said that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*, at 390; see also *id.*, at 390, n. 10 (elaborating). JUSTICE O'CONNOR's separate opinion for three Justices agreed with the Court's "obvious[ness]" test and observed that liability is appropriate when policymakers are "on actual or constructive notice" of the need to train, *id.*, at 396 (opinion concurring in part and dissenting in part). It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.

Canton's objective standard, however, is not an appropriate test for determining the liability of prison officials under the Eighth Amendment as interpreted in our cases. Section 1983, which merely provides a cause of action, "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels* v. *Williams*, 474 U. S. 327, 330 (1986). And while deliberate indifference serves under the Eighth Amendment to ensure that only inflictions of punishment carry liability, see *Wilson*, 501 U. S., at 299–300, the "term was used in the *Canton* case for the quite different purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents," *Collins* v. *Harker Heights*, 503 U. S. 115, 124 (1992), a purpose the *Canton* Court found satisfied by a test permitting liability when a municipality disregards "obvious" needs. Needless to say, moreover, considerable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official. For these reasons, we cannot accept petitioner's argument that *Canton* compels the conclusion here that a prison official who was unaware of a substantial risk of harm to an inmate may nevertheless be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed it.

We are no more persuaded by petitioner's argument that, without an objective test for deliberate indifference, prison officials will be free to ignore obvious dangers to inmates. Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm. Cf. 1 C. Torcia, Wharton's Criminal Law § 27, p. 141 (14th ed. 1978); Hall 115. We doubt that a subjective approach will present prison officials with any serious motivation "to take refuge in the zone between 'ignorance of obvious risks' and 'actual knowledge of risks.'" Brief for Petitioner 27. Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, cf. Hall 118 (cautioning against "confusing a mental state with the proof of its existence"), and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. Cf. LaFave & Scott § 3.7, p. 335 ("[I]f the risk is obvious, so that a reasonable man would realize it, we might well infer that [the defendant] did in fact realize it; but the inference cannot be conclusive, for we know that people are not always conscious of what reasonable people would be conscious of"). For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." Brief for Respondents 22.[8]

Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault. The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," *Helling*, 509 U. S., at 35, and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk. See Brief for Respondents 15 (stating that a prisoner can establish exposure to a sufficiently serious risk of harm "by showing that he belongs to an identifiable group of prisoners who are frequently singled out for violent attack by other inmates"). If, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station," *Hutto* v. *Finney,* 437 U. S. 678, 681–682, n. 3 (1978), it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom. Cf. *Helling, supra,* at 33 (observing that the Eighth Amendment requires a remedy for exposure of inmates to "infectious maladies" such as hepatitis and venereal disease "even though the possible infection might not affect all of those exposed"); *Commonwealth* v. *Welansky,* 316 Mass. 383, 55 N. E. 2d 902 (1944) (affirming conviction for manslaughter under a law requiring reckless or wanton conduct of a nightclub owner who failed to protect patrons from a fire, even though the owner did not know in advance who would light the match that ignited the fire or which patrons would lose their lives); *State* v. *Julius,* 185 W. Va. 422, 431–432, 408 S. E. 2d 1, 10–11 (1991) (holding that a defendant may be held criminally liable for injury to an unanticipated victim).

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[8] While the obviousness of a risk is not conclusive and a prison official may show that the obvious escaped him, see *infra*, at 844, he would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist (as when a prison official is aware of a high probability of facts indicating that one prisoner has planned an attack on another but resists opportunities to obtain final confirmation; or when a prison official knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease). When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly.

Because, however, prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety. That a trier of fact may infer knowledge from the obvious, in other words, does not mean that it must do so. Prison officials charged with deliberate indifference might show, for example, that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger, or that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.

In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted. A prison official's duty under the Eighth Amendment is to ensure " 'reasonable safety,' " *Helling, supra,* at 33; see also *Washington* v. *Har-*

per, 494 U. S., at 225; *Hudson* v. *Palmer,* 468 U. S., at 526–527, a standard that incorporates due regard for prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions," *Spain* v. *Procunier,* 600 F. 2d 189, 193 (CA9 1979) (Kennedy, J.); see also *Bell* v. *Wolfish,* 441 U. S. 520, 547–548, 562 (1979). Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause.

We address, finally, petitioner's argument that a subjective deliberate indifference test will unjustly require prisoners to suffer physical injury before obtaining court-ordered correction of objectively inhumane prison conditions. "It would," indeed, "be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Helling, supra,* at 33. But nothing in the test we adopt today clashes with that common sense. Petitioner's argument is flawed for the simple reason that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 593 (1923). Consistently with this principle, a subjective approach to deliberate indifference does not require a prisoner seeking "a remedy for unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief." *Helling, supra,* at 33–34.

In a suit such as petitioner's, insofar as it seeks injunctive relief to prevent a substantial risk of serious injury from ripening into actual harm, "the subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct," *Helling, supra,* at 36: their attitudes and conduct at the time suit is brought and persisting thereafter. An inmate seeking an injunction on the ground that there is "a contemporary violation of a nature likely to continue," *United States* v. *Oregon State Medical Soc.,* 343 U. S. 326, 333 (1952), must adequately plead such a violation; to survive summary judgment, he must come forward with evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future. In so doing, the inmate may rely, in the district court's discretion, on developments that postdate the pleadings and pretrial motions, as the defendants may rely on such developments to establish that the inmate is not entitled to an injunction.[9] See Fed. Rule Civ. Proc. 15(d); 6A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §§ 1504–1510, pp. 177–211 (2d ed. 1990). If the court finds the Eighth Amendment's subjective and objective requirements satisfied, it may grant appropriate injunctive relief. See *Hutto* v. *Finney*, 437 U. S., at 685–688, and n. 9 (upholding order designed to halt "an ongoing violation" in prison conditions that included extreme overcrowding, rampant violence, insufficient food, and unsanitary conditions). Of course, a district court should approach issuance of injunctive orders with the usual caution, see *Bell* v. *Wolfish*, *supra*, at 562 (warning courts against becoming "enmeshed in the minutiae of prison operations"), and may, for example, exercise its discretion if appropriate by giving prison officials time to rectify the situation before issuing an injunction.

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[9] If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment, and in deciding whether an inmate has established a continuing constitutional violation a district court may take such developments into account. At the same time, even prison officials who had a subjectively culpable state of mind when the lawsuit was filed could prevent issuance of an injunction by proving, during the litigation, that they were no longer unreasonably disregarding an objectively intolerable risk of harm and that they would not revert to their obduracy upon cessation of the litigation.

That prison officials' "current attitudes and conduct," *Helling*, 509 U. S., at 36, must be assessed in an action for injunctive relief does not mean, of course, that inmates are free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court. "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity," *Meredith* v. *Winter Haven*, 320 U. S. 228, 235 (1943), and any litigant making such an appeal must show that the intervention of equity is required. When a prison inmate seeks injunctive relief, a court need not ignore the inmate's failure to take advantage of adequate prison procedures, and an inmate who needlessly bypasses such procedures may properly be compelled to pursue them. Cf. 42 U. S. C. § 1997e (authorizing district courts in § 1983 actions to require inmates to exhaust "such plain, speedy, and effective administrative remedies as are available"). Even apart from the demands of equity, an inmate would be well advised to take advantage of internal prison procedures for resolving inmate grievances. When those procedures produce results, they will typically do so faster than judicial processes can. And even when they do not bring constitutionally required changes, the inmate's task in court will obviously be much easier.

Accordingly, we reject petitioner's arguments and hold that a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.

III

A

Against this backdrop, we consider whether the District Court's disposition of petitioner's complaint, summarily affirmed without briefing by the Court of Appeals for the Seventh Circuit, comports with Eighth Amendment principles. We conclude that the appropriate course is to remand.

In granting summary judgment to respondents on the ground that petitioner had failed to satisfy the Eighth Amendment's subjective requirement, the District Court may have placed decisive weight on petitioner's failure to notify respondents of a risk of harm. That petitioner "never expressed any concern for his safety to any of [respondents]," App. 124, was the only evidence the District Court cited for its conclusion that there was no genuine dispute about respondents' assertion that they "had no knowledge of any potential danger to [petitioner]," *ibid.* But with respect to each of petitioner's claims, for damages and for injunctive relief, the failure to give advance notice is not dispositive. Petitioner may establish respondents' awareness by reliance on any relevant evidence. See *supra,* at 842.

The summary judgment record does not so clearly establish respondents' entitlement to judgment as a matter of law on the issue of subjective knowledge that we can simply assume the absence of error below. For example, in papers filed in opposition to respondents' summary-judgment motion, petitioner pointed to respondents' admission that petitioner is a "non-violent" transsexual who, because of petitioner's "youth and feminine appearance" is "likely to experience a great deal of sexual pressure" in prison. App. 50–51, 73–74. And petitioner recounted a statement by one of the respondents, then warden of the penitentiary in Lewisburg, Pennsylvania, who told petitioner that there was "a high probability that [petitioner] could not safely function at USP-Lewisburg," *id.,* at 109, an incident confirmed in a published District Court opinion. See *Farmer* v. *Carlson,* 685 F. Supp., at 1342; see also *ibid.* ("Clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at [USP-]Lewisburg, a [high-]security institution, could pose a significant threat to internal security in general and to plaintiff in particular").

We cannot, moreover, be certain that additional evidence is unavailable to petitioner because in denying petitioner's Rule 56(f) motion for additional discovery the District Court may have acted on a mistaken belief that petitioner's failure to notify was dispositive. Petitioner asserted in papers accompanying the Rule 56(f) motion that the requested documents would show that "each defendant had knowledge that USP-Terre Haute was and is, a violent institution with a history of sexual assault, stabbings, etc., [and that] each defendant showed reckless disregard for my safety by designating me to said institution knowing that I would be sexually assaulted." App. 105–106. But in denying the Rule 56(f) motion, the District Court stated that the requested documents were "not shown by plaintiff to be necessary to oppose defendants' motion for summary judgment," *id.*, at 121, a statement consistent with the erroneous view that failure to notify was fatal to petitioner's complaint.

Because the District Court may have mistakenly thought that advance notification was a necessary element of an Eighth Amendment failure-to-protect claim, we think it proper to remand for reconsideration of petitioner's Rule 56(f) motion and, whether additional discovery is permitted or not, for application of the Eighth Amendment principles explained above.[10]

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[10] The District Court's opinion is open to the reading that it required not only advance notification of a substantial risk of assault, but also advance notification of a substantial risk of assault posed by a particular fellow prisoner. See App. 124 (referring to "a specific threat to [a prisoner's] safety"). The Eighth Amendment, however, imposes no such requirement. See *supra,* at 842–844.

B

Respondents urge us to affirm for reasons not relied on below, but neither of their contentions is so clearly correct as to justify affirmance.

With respect to petitioner's damages claim, respondents argue that the officials sued in their individual capacities (officials at FCI-Oxford and the Bureau of Prisons North Central Region office) were alleged to be liable only for their transfer of petitioner from FCI-Oxford to USP-Terre Haute, whereas petitioner "nowhere alleges any reason for believing that these officials, who had no direct responsibility for administering the Terre Haute institution, would have had knowledge of conditions within that institution regarding danger to transsexual inmates." Brief for Respondents 27–28. But petitioner's Rule 56(f) motion alleged just that. Though respondents suggest here that petitioner offered no factual basis for that assertion, that is not a ground on which they chose to oppose petitioner's Rule 56(f) motion below and, in any event, is a matter for the exercise of the District Court's judgment, not ours. Finally, to the extent respondents seek affirmance here on the ground that officials at FCI-Oxford and the Bureau of Prisons regional office had no power to control prisoner placement at Terre Haute, the record gives at least a suggestion to the contrary; the affidavit of one respondent, the warden of USP-Terre Haute, states that after having been at USP-Terre Haute for about a month petitioner was placed in administrative segregation "pursuant to directive from the North Central Regional Office" and a "request . . . by staff at FCI-Oxford." App. 94–95. Accordingly, though we do not reject respondents' arguments about petitioner's claim for damages, the record does not permit us to accept them as a basis for affirmance when they were not relied upon below. Respondents are free to develop this line of argument on remand.

With respect to petitioner's claim for injunctive relief, respondents argued in their merits brief that the claim was "foreclosed by [petitioner's] assignment to administrative detention status because of his high-risk HIV-positive condition, . . . as well as by the absence of any allegation . . . that administrative detention status poses any continuing threat of physical injury to him." Brief for Respondents 28–29. At oral argument, however, the Deputy Solicitor General informed us that petitioner was no longer in administrative detention, having been placed in the general prison population of a medium-security prison. Tr. of Oral Arg. 25–26. He suggested that affirmance was nevertheless proper because "there is no present threat" that petitioner will be placed in a setting where he would face a "continuing threat of physical injury," *id.*, at 26, but this argument turns on facts about the likelihood of a transfer that the District Court is far better placed to evaluate than we are. We leave it to respondents to present this point on remand.

IV

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE BLACKMUN, concurring.

I agree with JUSTICE STEVENS that inhumane prison conditions violate the Eighth Amendment even if no prison official has an improper, subjective state of mind. This Court's holding in *Wilson* v. *Seiter*, 501 U. S. 294 (1991), to the effect that barbaric prison conditions may be beyond the reach of the Eighth Amendment if no prison official can be deemed individually culpable, in my view is insupportable in principle and is inconsistent with our precedents interpreting the Cruel and Unusual Punishments Clause. Whether the Constitution has been violated "should turn on the character of the punishment rather than the motivation of the individual who inflicted it." *Estelle* v. *Gamble*, 429 U. S. 97, 116

(1976) (STEVENS, J., dissenting). *Wilson* v. *Seiter* should be overruled.

Although I do not go along with the Court's reliance on *Wilson* in defining the "deliberate indifference" standard, I join the Court's opinion, because it creates no new obstacles for prison inmates to overcome, and it sends a clear message to prison officials that their affirmative duty under the Constitution to provide for the safety of inmates is not to be taken lightly. Under the Court's decision today, prison officials may be held liable for failure to remedy a risk so obvious and substantial that the officials must have known about it, see *ante,* at 842–843, and prisoners need not "'await a tragic event [such as an] actua[l] assaul[t] before obtaining relief,'" *ante,* at 845.

I

Petitioner is a transsexual who is currently serving a 20-year sentence in an all-male federal prison for credit card fraud. Although a biological male, petitioner has undergone treatment for silicone breast implants and unsuccessful surgery to have his testicles removed. Despite his overtly feminine characteristics, and his previous segregation at a different federal prison because of safety concerns, see *Farmer* v. *Carlson,* 685 F. Supp. 1335, 1342 (MD Pa. 1988), prison officials at the United States Penitentiary in Terre Haute, Indiana, housed him in the general population of that maximum-security prison. Less than two weeks later, petitioner was brutally beaten and raped by another inmate in petitioner's cell.

Homosexual rape or other violence among prison inmates serves absolutely no penological purpose. See *Rhodes* v. *Chapman,* 452 U. S. 337, 345–346 (1981), citing *Gregg* v. *Georgia,* 428 U. S. 153, 183 (1976) (joint opinion) (the Eighth Amendment prohibits all punishment, physical and mental, which is "totally without penological justification"). "Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity." *United States* v. *Bai-*

ley, 444 U. S. 394, 423 (1980) (BLACKMUN, J., dissenting). The horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure. See Note, Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of *Wilson v. Seiter,* 44 Stan. L. Rev. 1541, 1545 (1992). Unable to fend for himself without the protection of prison officials, the victim finds himself at the mercy of larger, stronger, and ruthless inmates. Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit card fraud or tax evasion, degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials.*

The fact that our prisons are badly overcrowded and understaffed may well explain many of the shortcomings of our penal systems. But our Constitution sets minimal standards governing the administration of punishment in this country, see *Rhodes,* 452 U. S., at 347, and thus it is no answer to the complaints of the brutalized inmate that the re-

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*Numerous court opinions document the pervasive violence among inmates in our state and federal prisons. See, *e. g., United States* v. *Bailey,* 444 U. S. 394, 421 (1980) (BLACKMUN, J., dissenting); *McGill* v. *Duckworth,* 944 F. 2d 344, 348 (CA7 1991), cert. denied, 503 U. S. 907 (1992); *Redman* v. *County of San Diego,* 942 F. 2d 1435 (CA9 1991) (en banc), cert. denied, 502 U. S. 1074 (1992); *Hassine* v. *Jeffes,* 846 F. 2d 169, 172 (CA3 1988); *Alberti* v. *Klevenhagen,* 790 F. 2d 1220, 1222 (CA5), clarified, 799 F. 2d 992 (CA5 1986); *Jones* v. *Diamond,* 636 F. 2d 1364, 1372 (CA5 1981), overruled on other grounds, 790 F. 2d 1174 (CA5 1986); *Withers* v. *Levine,* 615 F. 2d 158, 161 (CA4), cert. denied, 449 U. S. 849 (1980); *Little* v. *Walker,* 552 F. 2d 193, 194 (CA7 1977), cert. denied, 435 U. S. 932 (1978); *Holt* v. *Sarver,* 442 F. 2d 304, 308 (CA8 1971), later proceeding *sub nom. Hutto* v. *Finney,* 437 U. S. 678 (1978).

sources are unavailable to protect him from what, in reality, is nothing less than torture. I stated in dissent in *United States* v. *Bailey:*

> "It is society's responsibility to protect the life and health of its prisoners. '[W]hen a sheriff or a marshall *[sic]* takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act. We* have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not' (emphasis in original). Address by THE CHIEF JUSTICE, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.)." 444 U. S., at 423.

The Court in *Wilson* v. *Seiter,* 501 U. S. 294 (1991), held that any pain and suffering endured by a prisoner that is not formally a part of his sentence—no matter how severe or unnecessary—will not be held violative of the Cruel and Unusual Punishments Clause unless the prisoner establishes that some prison official intended the harm. The Court justified this remarkable conclusion by asserting that only pain that is intended by a state actor to be punishment is punishment. See *id.,* at 300 ("The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment.* If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify") (emphasis in original).

The Court's analysis is fundamentally misguided; indeed it defies common sense. "Punishment" does not necessarily imply a culpable state of mind on the part of an identifiable punisher. A prisoner may experience punishment when he suffers "severe, rough, or disastrous treatment," see, *e. g.,* Webster's Third New International Dictionary 1843 (1961), regardless of whether a state actor intended the cruel treatment to chastise or deter. See also Webster's New International Dictionary of the English Language 1736 (1923) (defining punishment as "[a]ny pain, suffering, or loss inflicted on *or suffered by* a person because of a crime or evil-doing") (emphasis added); cf. *Wilson,* 501 U. S., at 300, citing *Duckworth* v. *Franzen,* 780 F. 2d 645, 652 (CA7 1985) ("'The infliction of punishment is a deliberate act intended to chastise or deter'"), cert. denied, 479 U. S. 816 (1986).

The Court's unduly narrow definition of punishment blinds it to the reality of prison life. Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. Under such circumstances, it is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.

Wilson's myopic focus on the intentions of *prison officials* is also mistaken. Where a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably. *Wilson* failed to recognize that "state-sanctioned punishment consists not so much of specific acts attributable to individual state officials, but more of a cumulative agglomeration of action (and inaction) on an institutional level." The Supreme Court—Leading Cases, 105 Harv. L. Rev. 177, 243 (1991). The responsibility for subminimal conditions in any prison inevitably is diffuse, and often borne, at least in part, by the legislature. Yet, regardless of what state actor or institution caused the harm and with what intent, the experience of the inmate is the same. A punishment is simply no less cruel or unusual because its harm is unintended. In view of this obvious fact, there is no reason to believe that, in adopting the Eighth Amendment, the Framers intended to prohibit cruel and unusual punishments only when they were inflicted intentionally. As Judge Noonan has observed:

> "The Framers were familiar from their wartime experience of British prisons with the kind of cruel punishment administered by a warden with the mentality of a Captain Bligh. *But they were also familiar with the cruelty that came from bureaucratic indifference to the conditions of confinement.* The Framers understood that cruel and unusual punishment can be administered by the failure of those in charge to give heed to the impact of their actions on those within their care." *Jordan* v. *Gardner*, 986 F. 2d 1521, 1544 (CA9 1993) (concurring opinion) (citations omitted) (emphasis added).

Before *Wilson*, it was assumed, if not established, that the conditions of confinement are themselves part of the punishment, even if not specifically "meted out" by a statute or judge. See *Wilson*, 501 U. S., 306–309 (White, J., concurring in judgment), citing *Hutto* v. *Finney*, 437 U. S. 678 (1978); *Rhodes* v. *Chapman*, 452 U. S. 337 (1981). We examined only the objective severity of the conditions of confinement in the pre-*Wilson* cases, not the subjective intent of government officials, as we found that "[a]n express intent to inflict unnecessary pain is not required, . . . and *harsh 'conditions of confinement' may constitute cruel and unusual punishment* unless such conditions 'are part of the penalty that criminal offenders pay for their offenses against society.'" *Whitley* v. *Albers*, 475 U. S. 312, 319 (1986), quoting *Rhodes*, 452 U. S., at 347 (emphasis added). This initial approach, which employed an objective standard to chart the boundaries of the Eighth Amendment, reflected the practical reality that "intent simply is not very meaningful when considering a challenge to an institution, such as a prison system," *Wilson*, 501 U. S., at 310 (White, J., concurring in judgment). It also, however, demonstrated a commitment to the principles underlying the Eighth Amendment. The Cruel and Unusual Punishments Clause was not adopted to protect prison officials with arguably benign intentions from lawsuits. The Eighth Amendment guarantees each prisoner that reasonable measures will be taken to ensure his safety. Where a prisoner can prove that no such reasonable steps were taken and, as a result, he experienced severe pain or suffering without any penological justification, the Eighth Amendment is violated regardless of whether there is an easily identifiable wrongdoer with poor intentions.

II

Though I believe *Wilson* v. *Seiter* should be overruled, and disagree with the Court's reliance upon that case in defining the "deliberate indifference" standard, I nonetheless join the Court's opinion. Petitioner never challenged this Court's holding in *Wilson* or sought reconsideration of the theory upon which that decision is based. More importantly, the Court's opinion does not extend *Wilson* beyond its ill-conceived boundaries or erect any new obstacles for prison inmates to overcome in seeking to remedy cruel and unusual conditions of confinement. The Court specifically recognizes that "[h]aving incarcerated 'persons [with] demonstrated proclivities for criminally antisocial and, in many cases, violent conduct,' [and] having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Ante*, at 833. The Court further acknowledges that prison rape is not constitutionally tolerable, see *ante*, at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society'"), and it clearly states that prisoners can obtain relief before being victimized, see *ante*, at 845 ("[A] subjective approach to deliberate indifference does not require a prisoner seeking 'a remedy for unsafe conditions [to] await a tragic event [such as an] actua[l] assaul[t] before obtaining relief' "). Finally, under the Court's holding, prison officials may be held liable for failure to remedy a risk of harm so obvious and substantial that the prison officials must have known about it, see *ante*, at 842–843. The opinion's clear message is that prison officials must fulfill their affirmative duty under the Constitution to prevent inmate assault, including prison rape, or otherwise face a serious risk of being held liable for damages, see *ante*, at 842–844, or being required by a court to rectify the hazardous conditions, see *ante*, at 845–847. As much as is possible within the constraints of *Wilson* v. *Seiter*, the Court seeks to ensure that the conditions in our Nation's prisons in fact comport with the "contemporary standard of decency" required by the Eighth Amendment. See *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 198–200 (1989). Short of overruling *Wilson* v. *Seiter*, the Court could do no better.

JUSTICE STEVENS, concurring.

While I continue to believe that a state official may inflict cruel and unusual punishment without any improper subjective motivation, see *Estelle* v. *Gamble*, 429 U. S. 97, 116–117 (1976) (dissenting opinion); *Wilson* v. *Seiter*, 501 U. S. 294, 306–307 (1991) (White, J., concurring in judgment), I join JUSTICE SOUTER's thoughtful opinion because it is faithful to our precedents.

JUSTICE THOMAS, concurring in the judgment.

Prisons are necessarily dangerous places; they house society's most antisocial and violent people in close proximity with one another. Regrettably, "[s]ome level of brutality and sexual aggression among [prisoners] is inevitable no matter what the guards do . . . unless all prisoners are locked in their cells 24 hours a day and sedated." *McGill* v. *Duckworth,* 944 F. 2d 344, 348 (CA7 1991). Today, in an attempt to rectify such unfortunate conditions, the Court further refines the "National Code of Prison Regulation," otherwise known as the Cruel and Unusual Punishments Clause. *Hudson* v. *McMillian,* 503 U. S. 1, 28 (1992) (THOMAS, J., dissenting).

I adhere to my belief, expressed in *Hudson* and *Helling* v. *McKinney,* 509 U. S. 25 (1993) (THOMAS, J., dissenting), that "judges or juries—but not jailers—impose 'punishment.'" *Id.,* at 40. "[P]unishment," from the time of the Founding through the present day, "has always meant a 'fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him.'" *Id.,* at 38 (quoting Black's Law Dictionary 1234 (6th ed. 1990)). See also 2 T. Sheridan, A General Dictionary of the English Language (1780) (defining "punishment" as "[a]ny infliction imposed in vengeance of a crime"). Conditions of confinement are not punishment in any recognized sense of the term, unless imposed as part of a sentence. See *Helling, supra,* at 42 (THOMAS, J., dissenting). As an original matter, therefore, this case would be an easy one for me: Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute "punishment" under the Eighth Amendment.

When approaching this case, however, we do not write on a clean slate. Beginning with *Estelle* v. *Gamble,* 429 U. S. 97 (1976), the Court's prison condition jurisprudence has been guided, not by the text of the Constitution, but rather by "evolving standards of decency that mark the progress of a maturing society." *Id.,* at 102 (internal quotation marks omitted). See also *ante,* at 833–834; *Helling, supra; Hudson, supra.* I continue to doubt the legitimacy of that mode of constitutional decisionmaking, the logical result of which, in this context, is to transform federal judges into superintendents of prison conditions nationwide. See *Helling, supra,* at 40–41 (THOMAS, J., dissenting). Although *Estelle* loosed the Eighth Amendment from its historical moorings, the Court is now unwilling to accept the full consequences of its decision and therefore resorts to the "subjective" (state of mind) component of post-*Estelle* Eighth Amendment analysis in an attempt to contain what might otherwise be unbounded liability for prison officials under the Cruel and Unusual Punishments Clause. Cf. *McGill, supra,* at 348.

Although I disagree with the constitutional predicate of the Court's analysis, I share the Court's view that petitioner's theory of liability—that a prison official can be held liable for risks to prisoner safety of which he was ignorant but should have known—fails under even "a straightforward application of *Estelle.*" *Helling, supra,* at 42 (THOMAS, J., dissenting). In adopting the "deliberate indifference" standard for challenges to prison conditions, *Estelle* held that mere "inadverten[ce]" or "negligen[ce]" does not violate the Eighth Amendment. 429 U. S., at 105–106. "From the outset, thus, we specified that the Eighth Amendment does not apply to every deprivation, or even every unnecessary deprivation, suffered by a prisoner, but *only* that narrow class of deprivations involving 'serious' injury inflicted by prison officials acting with a culpable state of mind." *Hudson, supra,* at 20 (THOMAS, J., dissenting). We reiterated this understanding in *Wilson* v. *Seiter,* 501 U. S. 294, 305 (1991), holding that "mere negligence" does not constitute deliberate indifference under *Estelle.* See also, *e. g., Whitley* v. *Albers,* 475 U. S. 312, 319 (1986). Petitioner's suggested "should have known" standard is nothing but a negligence standard, as the Court's discussion implicitly assumes. *Ante,* at 837–839. Thus, even under *Estelle,* petitioner's theory of liability necessarily fails.

The question remains, however, what state of mind *is* sufficient to constitute deliberate indifference under *Estelle.*

Given my serious doubts concerning the correctness of *Estelle* in extending the Eighth Amendment to cover challenges to conditions of confinement, I believe the scope of the *Estelle* "right" should be confined as narrowly as possible. Cf. *Helling, supra,* at 42 (THOMAS, J., dissenting). In *Wilson,* the Court has already held that the highest subjective standard known to our Eighth Amendment jurisprudence—"maliciou[s] and sadisti[c]" action "for the very purpose of causing harm," *Whitley, supra,* at 320–321 (internal quotation marks omitted)—"does not apply to prison conditions cases." *Wilson, supra,* at 303. The Court today adopts the next highest level of subjective intent, actual knowledge of the type sufficient to constitute recklessness in the criminal law, *ante,* at 837, 839–840, noting that "due regard" is appropriate "for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions.'"[1] *Ante,* at 845 (quoting *Spain* v. *Procunier,* 600 F. 2d 189, 193 (CA9 1979) (Kennedy, J.)).

Even though the Court takes a step in the right direction by adopting a restrictive definition of deliberate indifference, I cannot join the Court's opinion. For the reasons expressed more fully in my dissenting opinions in *Hudson* and *Helling,* I remain unwilling to subscribe to the view, adopted by *ipse dixit* in *Estelle,* that the Eighth Amendment regulates prison conditions not imposed as part of a sentence. Indeed, "[w]ere the issue squarely presented, . . . I might vote to overrule *Estelle.*" *Helling,* 509 U. S., at 42 (THOMAS, J., dissenting). Nonetheless, the issue is not squarely presented in this case. Respondents have not asked us to revisit *Estelle,* and no one has briefed or argued the question. In addition to these prudential concerns, *stare decisis* counsels hesitation in overruling dubious precedents. See 509 U. S., at 42. For these reasons, I concur in the Court's judgment.[2] In doing so, however, I remain hopeful that in a proper case the Court will reconsider *Estelle* in light of the constitutional text and history.

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[1] The facts of this case demonstrate how difficult that task can be. When petitioner was taken out of general prison population for security reasons at United States Penitentiary-Lewisburg, he asserted that he "d[id] not need extra security precautions" and filed suit alleging that placing him in solitary confinement was unconstitutional. See *Farmer* v. *Carlson,* 685 F. Supp. 1335, 1342 (MD Pa. 1988). Petitioner's present claim, oddly enough, is essentially that *leaving him* in general prison population was unconstitutional because it subjected him to a risk of sexual assault.

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[2] I do not read the remand portion of the Court's opinion to intimate that the courts below reached the wrong result, especially because the Seventh Circuit has long followed the rule of law the Court lays down today. See *McGill* v. *Duckworth,* 944 F. 2d 344 (CA7 1991); *Duckworth* v. *Franzen,* 780 F. 2d 645 (CA7 1985). Rather, I regard it as a cautionary measure undertaken merely to give the Court of Appeals an opportunity to decide in the first instance whether the District Court erroneously gave dispositive weight to petitioner's failure to complain to prison officials that he believed himself at risk of sexual assault in the general prison population. *Ante,* at 849. If, on remand, the Seventh Circuit concludes that the District Court did not, nothing in the Court's opinion precludes the Seventh Circuit from summarily affirming the entry of summary judgment in respondents' favor.

DIGITAL EQUIPMENT CORP. *v.* DESKTOP DIRECT, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 93–405. Argued February 22, 1994—Decided June 6, 1994

Pursuant to a settlement agreement between the parties, the District Court dismissed a trademark infringement suit that respondent Desktop Direct, Inc., had filed against petitioner Digital Equipment Corporation. Months later, it granted Desktop's motion to vacate the dismissal and rescind the agreement on the ground that Digital had misrepresented material facts during settlement negotiations. The Court of Appeals dismissed Digital's appeal for lack of jurisdiction, see 28 U. S. C. § 1291, holding that the District Court order was not immediately appealable under the collateral order doctrine. Applying the three-pronged test set forth in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, and *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, it concluded that the entitlement claimed under the settlement agreement was insufficiently "important" to warrant immediate appeal as of right and reasoned that an alleged privately negotiated "right not to go to trial" was different in kind from an immunity rooted in an explicit constitutional or statutory provision or compelling public policy rationale, the denial of which has been held to be immediately appealable.

Held: A refusal to enforce a settlement agreement claimed to shelter a party from suit is not immediately appealable under § 1291. Pp. 867–884.

(a) Although certain categories of prejudgment decisions justify departure from § 1291's general final judgment requirement, the collateral order doctrine is a narrow exception and should never be allowed to swallow the rule. Thus, immediate appeal is confined to those decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such questions effectively unreviewable on appeal from the final judgment in the underlying action. See *Coopers & Lybrand, supra.* Appealability must be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision. Pp. 867–868.

(b) Orders denying immunities are strong candidates for prompt appeal under § 1291. *Abney* v. *United States*, 431 U. S. 651 (right to be free from a second trial on a criminal charge); *Mitchell* v. *Forsyth*, 472 U. S. 511 (right of government official to qualified immunity from damages suit). However, merely identifying some interest that would be "irretrievably lost" has never sufficed to meet the third *Cohen* requirement, see generally *Lauro Lines s.r.l.* v. *Chasser*, 490 U. S. 495, 499, for then appellate jurisdiction would depend on a party's agility in characterizing the right asserted. Even limiting the focus to whether the interest claimed may be called a "right not to stand trial" would move § 1291 aside too easily, since virtually any right that could be enforced appropriately by pretrial dismissal might loosely be so described. Precisely because there is no single, obviously correct way to characterize an asserted right, § 1291 requires courts of appeals to view claims of a "right not to be tried" with skepticism. Pp. 868–875.

(c) That Digital's agreement may be read as providing for immunity from trial does not distinguish its claim from other arguable rights to be trial free, such as an assertion of res judicata, and attaching significance to the supposed clarity of this agreement's terms would flout the admonition that availability of collateral order appeal must be determined categorically. More fundamentally, such a right by agreement does not rise to the level of importance needed for recognition under § 1291. Digital errs in maintaining that "importance" has no place in a doctrine justified as supplying a gloss on Congress's "final decision" language. The third *Cohen* question, whether a right is "adequately vindicable" or "effectively reviewable," simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement. While there is no need to decide here that a privately conferred right could never supply the basis of a collateral order appeal, there are sound reasons for treating such rights differently from those originating in the Constitution or statutes. There is little room to gainsay the importance of the public policy embodied in constitutional or statutory provisions entitling a party to immunity from suit, but including such a provision in a private contract is barely a prima facie indication that the right is important to the benefited party, let alone that its value exceeds that of other rights not embodied in agreements, or that it is "important" in *Cohen's* sense, as being weightier than the policies advanced by § 1291. Pp. 875–881.

(d) Even if the term "importance" were to be exorcised from the *Cohen* analysis altogether, Digital's rights would remain adequately vindicable on final judgment to an extent that other immunities are not. Freedom from trial is rarely the *sine qua non* of a negotiated settlement agreement and will rarely compare with the embarrassment and anxiety averted by a successful double jeopardy claimant or the distraction from duty avoided by qualified immunity. Moreover, unlike trial immunity claimants relying on public law, a settling party can seek relief in state court for breach of contract or may move for a sanction under Federal Rule of Civil Procedure 11 if a rescission was sought for improper purposes. In addition, Digital's insistence that the District Court applied a fundamentally wrong legal standard in vacating the dismissal order here might support a discretionary interlocutory appeal under 28 U. S. C. § 1292(b). Pp. 881–883.

993 F. 2d 755, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

John G. Roberts, Jr., argued the cause for petitioner. With him on the briefs were *David G. Leitch, Laurence R. Hefter, David M. Kelly,* and *Thomas C. Siekman.*

Rex E. Lee argued the cause for respondent. With him on the brief were *Carter G. Phillips, Gene C. Schaerr, Janet M. Letson, John Paul Kennedy,* and *H. Ross Workman.**

JUSTICE SOUTER delivered the opinion of the Court.

Section 1291 of the Judicial Code confines appeals as of right to those from "final decisions of the district courts." 28 U. S. C. § 1291. This case raises the question whether an order vacating a dismissal predicated on the parties' settlement agreement is final as a collateral order even without a district court's resolution of the underlying cause of action. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). We hold that an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders.

I

Respondent, Desktop Direct, Inc. (Desktop), sells computers and like equipment under the trade name "Desktop Direct." Petitioner, Digital Equipment Corporation, is engaged in a similar business and in late 1991 began using that trade name to market a new service it called "Desktop Direct from Digital." In response, Desktop filed this action in the

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**James W. Geriak* filed a brief for Spectra-Physics, Inc., et al. as *amici curiae* urging reversal.

United States District Court for the District of Utah, charging Digital with unlawful use of the Desktop Direct name. Desktop sent Digital a copy of the complaint, and negotiations between officers of the two corporations ensued. Under a confidential settlement reached on March 25, 1992, Digital agreed to pay Desktop a sum of money for the right to use the "Desktop Direct" trade name and corresponding trademark, and for waiver of all damages and dismissal of the suit. That same day, Desktop filed a notice of dismissal in the District Court.

Several months later, Desktop moved to vacate the dismissal and rescind the settlement agreement, alleging misrepresentation of material facts during settlement negotiations. The District Court granted the motion, concluding "that a fact finder could determine that [Digital] failed to disclose material facts to [Desktop] during settlement negotiations which would have resulted in rejection of the settlement offer." App. to Pet. for Cert. 13a. After the District Court declined to reconsider that ruling or stay its order vacating dismissal, Digital appealed.

The Court of Appeals for the Tenth Circuit dismissed the appeal for lack of jurisdiction, holding that the District Court order was not appealable under § 1291, because it neither "end[ed] the litigation on the merits" nor "[fell] within the long-recognized 'collateral order' exception to the final judgment requirement." 993 F. 2d 755, 757 (1993). Applying the three-pronged test for determining when "collateral order" appeal is allowed, see *Cohen, supra; Coopers & Lybrand* v. *Livesay,* 437 U. S. 463 (1978), the Court of Appeals concluded that any benefits claimed under the settlement agreement were insufficiently "important" to warrant the immediate appeal as of right. Although Digital claimed what it styled a "right not to go to trial," the court reasoned that any such privately negotiated right as Digital sought to vindicate was different in kind from an immunity rooted in an explicit constitutional or statutory provision or "compelling public policy rationale," the denial of which has been held to be immediately appealable. 993 F. 2d, at 758–760.[1]

The Tenth Circuit recognized that it was thus deviating from the rule followed in some other Courts of Appeals, see *Forbus* v. *Sears, Roebuck & Co.*, 958 F. 2d 1036 (CA11 1992); *Grillet* v. *Sears, Roebuck & Co.*, 927 F. 2d 217 (CA5 1991); *Janneh* v. *GAF Corp.*, 887 F. 2d 432 (CA2 1989); but see *Transtech Industries, Inc.* v. *A & Z Septic Clean*, 5 F. 3d 51 (CA3 1993), cert. pending, No. 93–960. We granted certiorari, 510 U. S. 942 (1993), to resolve this conflict and now affirm.

II

A

The collateral order doctrine is best understood not as an exception to the "final decision" rule laid down by Congress in § 1291, but as a "practical construction" of it, *Cohen*, *supra*, at 546; see, *e. g.*, *Coopers & Lybrand*, *supra*, at 468. We have repeatedly held that the statute entitles a party to appeal not only from a district court decision that "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Catlin* v. *United States*, 324 U. S. 229, 233 (1945), but also from a narrow class of decisions that do not terminate the litigation, but must, in the interest of "achieving a healthy legal system," cf. *Cobbledick* v. *United States*, 309 U. S. 323, 326 (1940), nonetheless be treated as "final." The latter category comprises only those district court decisions that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. See generally *Coopers & Lybrand*, *supra*. Immediate appeals from such orders, we have explained, do not go against the grain of § 1291, with its object of efficient administration of justice in the federal courts, see generally *Richardson-Merrell Inc.* v. *Koller*, 472 U. S. 424 (1985).

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[1] The Tenth Circuit also denied Digital's request to stay the District Court proceedings. We granted a stay pending our disposition of Digital's petition for certiorari. 510 U. S. 804 (1993).

But we have also repeatedly stressed that the "narrow" exception should stay that way and never be allowed to swallow the general rule, *id.*, at 436, that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated, see *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 270 (1982). We have accordingly described the conditions for collateral order appeal as stringent, see, *e. g.*, *Midland Asphalt Corp.* v. *United States*, 489 U. S. 794, 799 (1989), and have warned that the issue of appealability under § 1291 is to be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a "particular injustic[e]" averted, *Van Cauwenberghe* v. *Biard*, 486 U. S. 517, 529 (1988), by a prompt appellate court decision. See also *Richardson-Merrell*, *supra*, at 439 (this Court "has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case [appealability] determination"); *Carroll* v. *United States*, 354 U. S. 394, 405 (1957).

B

Here, the Court of Appeals accepted Digital's claim that the order vacating dismissal (and so rescinding the settlement agreement) was the "final word on the subject addressed," 993 F. 2d, at 757 (citation omitted), and held the second *Cohen* condition, separability, to be satisfied, as well. Neither conclusion is beyond question,[2] but each is best left untouched here, both because Desktop has made no serious effort to defend the Court of Appeals' judgment on those points and because the failure to meet the third condition of the *Cohen* test, that the decision on an "important" question be "effectively unreviewable" upon final judgment, would in itself suffice to foreclose immediate appeal under § 1291.[3] Turning to these dispositive factors, we conclude, despite Digital's position that it holds a "right not to stand trial" requiring protection by way of immediate appeal, that rights under private settlement agreements can be adequately vindicated on appeal from final judgment.

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[2] It might be argued that given the District Court's "somewhat cryptic" reference, 993 F. 2d, at 757, to what "a trier of fact could determine," its recision order here was merely "tentative," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 469, n. 11 (1978), and thus inadequate under the first *Cohen* test, or that the basis for vacating, Digital's alleged misrepre-

C

The roots of Digital's argument that the settlement with Desktop gave it a "right not to stand trial altogether" (and that such a right *per se* satisfies the third *Cohen* requirement) are readily traced to *Abney* v. *United States*, 431 U. S. 651 (1977), where we held that § 1291 entitles a criminal defendant to appeal an adverse ruling on a double jeopardy claim, without waiting for the conclusion of his trial. After holding the second *Cohen* requirement satisfied by the distinction between the former jeopardy claim and the question of guilt to be resolved at trial, we emphasized that the Fifth Amendment not only secures the right to be free from multi-

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sentations about when it first learned of Desktop's use of the trade name, was so "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," 437 U. S., at 469 (internal quotation marks omitted), *i. e.*, whether Digital (willfully) misappropriated the name, as to elude *Cohen*'s second requirement for collateral order appeal. Indeed, it is possible that the District Court phrased its order here in equivocal terms precisely because it assumed that this lack of separability would preclude any immediate appeal under § 1291.

[3] We have of course held that the *Cohen* requirements go to an appellate court's subject-matter jurisdiction, see *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 379 (1981), and thus, were it necessary here, we would be obliged to assess whether each condition was met, without regard to whether the parties believe it to be satisfied.

ple punishments, but by its very terms embodies the broader principle, "'deeply ingrained in . . . the Anglo-American system of jurisprudence,'" that it is intolerable for "'the State, with all its resources . . . to make repeated attempts to convict an individual [defendant], thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity.'" 431 U. S., at 661–662 (quoting *Green* v. *United States*, 355 U. S. 184, 187–188 (1957)). We found that immediate appeal was the only way to give "full protection" to this constitutional right "not to face trial at all." 431 U. S., at 662, and n. 7; see also *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (decision denying immunity under the Speech and Debate Clause would be appealable under § 1291).

Abney's rationale was applied in *Nixon* v. *Fitzgerald*, 457 U. S. 731, 742 (1982), where we held to be similarly appealable an order denying the petitioner absolute immunity from suit for civil damages arising from actions taken while petitioner was President of the United States. Seeing this immunity as a "functionally mandated incident of the President's unique office, rooted in the . . . separation of powers and supported by our history," *id.*, at 749, we stressed that it served "compelling public ends," *id.*, at 758, and would be irretrievably lost if the former President were not allowed an immediate appeal to vindicate this right to be free from the rigors of trial, see *id.*, at 752, n. 32.

Next, in *Mitchell* v. *Forsyth*, 472 U. S. 511 (1985), we held that similar considerations supported appeal under § 1291 from decisions denying government officials qualified immunity from damages suits. An "essential attribute," *id.*, at 525, of this freedom from suit for past conduct not violative of clearly established law, we explained, is the "entitlement not to stand trial or face the other burdens of litigation," *id.*, at 526, one which would be "effectively lost if a case [were] erroneously permitted to go to trial," *ibid.* Echoing the reasoning of *Nixon* v. *Fitzgerald, supra* (and *Harlow* v. *Fitz-*

gerald, 457 U. S. 800 (1982)), we explained that requiring an official with a colorable immunity claim to defend a suit for damages would be "peculiarly disruptive of effective government," and would work the very "distraction . . . from . . . dut[y], inhibition of discretionary action, and deterrence of able people from public service" that qualified immunity was meant to avoid. See 472 U. S., at 526 (internal quotation marks omitted); see also *Puerto Rico Aqueduct and Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U. S. 139, 147 (1993) (State's Eleventh Amendment immunity from suit in federal court may be vindicated by immediate appeal under § 1291).

D

Digital puts this case on all fours with *Mitchell.* It maintains that it obtained dual rights under the settlement agreement with Desktop, not only a broad defense to liability but the "right not to stand trial," the latter being just like the qualified immunity held immediately appealable in *Mitchell.* As in *Mitchell*, that right must be enforceable on collateral order appeal, Digital asserts, or an adverse trial ruling will destroy it forever.

While Digital's argument may exert some pull on a narrow analysis, it does not hold up under the broad scrutiny to which all claims of immediate appealability under § 1291 must be subjected. To be sure, *Abney* and *Mitchell* are fairly cited for the proposition that orders denying certain immunities are strong candidates for prompt appeal under § 1291. But Digital's larger contention, that a party's ability to characterize a district court's decision as denying an irreparable "right not to stand trial" altogether is sufficient as well as necessary for a collateral order appeal, is neither an accurate distillation of our case law nor an appealing prospect for adding to it.

Even as they have recognized the need for immediate appeals under § 1291 to vindicate rights that would be "irretrievably lost," *Richardson-Merrell*, 472 U. S., at 431, if review were confined to final judgments only, our cases have been at least as emphatic in recognizing that the jurisdiction of the courts of appeals should not, and cannot, depend on a party's agility in so characterizing the right asserted. This must be so because the strong bias of § 1291 against piecemeal appeals almost never operates without some cost. A fully litigated case can no more be untried than the law's proverbial bell can be unrung, and almost every pretrial or trial order might be called "effectively unreviewable" in the sense that relief from error can never extend to rewriting history. Thus, erroneous evidentiary rulings, grants or denials of attorney disqualification, see, *e. g., Richardson-Merrell, supra,* and restrictions on the rights of intervening parties, see *Stringfellow* v. *Concerned Neighbors in Action,* 480 U. S. 370 (1987), may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment, cf. *Carroll,* 354 U. S., at 406; *Parr* v. *United States,* 351 U. S. 513, 519–520 (1956); and other errors, real enough, will not seem serious enough to warrant reversal at all, when reviewed after a long trial on the merits, see *Stringfellow, supra.* In still other cases, see *Coopers & Lybrand* v. *Livesay,* 437 U. S. 463 (1978), an erroneous district court decision will, as a practical matter, sound the "death knell" for many plaintiffs' claims that might have gone forward if prompt error correction had been an option. But if immediate appellate review were available every such time, Congress's final decision rule would end up a pretty puny one, and so the mere identification of some interest that would be "irretrievably lost" has never sufficed to meet the third *Cohen* requirement. See generally *Lauro Lines s.r.l.* v. *Chasser,* 490 U. S. 495, 499 (1989) ("It is always true, however, that 'there is value . . . in triumphing before trial, rather than after it'") (quoting *United States* v. *MacDonald,* 435 U. S. 850, 860, n. 7 (1978)); *Richardson-Merrell, supra,* at 436.

Nor does limiting the focus to whether the interest asserted may be called a "right not to stand trial" offer much protection against the urge to push the § 1291 limits. We have, after all, acknowledged that virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a "right not to stand trial," see, *e. g., Midland Asphalt*, 489 U. S., at 501; *Van Cauwenberghe* v. *Biard*, 486 U. S., at 524. Allowing immediate appeals to vindicate every such right would move § 1291 aside for claims that the district court lacks personal jurisdiction, see *Van Cauwenberghe, supra*, that the statute of limitations has run, see 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3918.5, and n. 65, p. 521 (1992), that the movant has been denied his Sixth Amendment right to a speedy trial, see *MacDonald, supra*, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim. Such motions can be made in virtually every case, see generally *id.*, at 862; *United States* v. *Hollywood Motor Car Co.*, 458 U. S., at 270, and it would be no consolation that a party's meritless summary judgment motion or res judicata claim was rejected on immediate appeal; the damage to the efficient and congressionally mandated allocation of judicial responsibility would be done, and any improper purpose the appellant might have had in saddling its opponent with cost and delay would be accomplished. Cf. *Richardson-Merrell, supra*, at 434 (appeals from "entirely proper" decisions impose the same costs as do appeals from "injudicious" ones). Thus, precisely because candor forces us to acknowledge that there is no single, "obviously correct way to characterize" an asserted right, *Lauro Lines, supra*, at 500, we have held that § 1291 requires courts of appeals to view claims of a "right not to be tried" with skepticism, if not a jaundiced eye. Cf. *Van Cauwenberghe, supra*, at 524–525.

In *Midland Asphalt,* for example, we had no trouble in dispatching a defendant's claim of entitlement to an immediate appeal from an order denying dismissal for alleged violation of Federal Rule of Criminal Procedure 6(e), forbidding disclosure of secret grand jury information. Noting " 'a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges,' " 489 U. S., at 801, quoting *Hollywood Motor Car, supra,* at 269, we observed that Rule 6(e) "contains no hint," 489 U. S., at 802, of an immunity from trial, and we contrasted that Rule with the Fifth Amendment's express provision that "[n]o person shall be held to answer" for a serious crime absent grand jury indictment. Only such an "explicit statutory or constitutional guarantee that trial will not occur," we suggested, *id.,* at 801, could be grounds for an immediate appeal of right under § 1291.[4]

The characterization issue surfaced again (and more ominously for Digital, see *infra,* at 880) in *Lauro Lines, supra,* where a defendant sought to appeal under § 1291 from an order denying effect to a contractual provision that a Neapolitan court would be the forum for trying all disputes arising from the parties' cruise-ship agreement. While we realized of course that the value of the forum-selection clause would be diminished if the defendant could be tried before appealing, we saw the contractual right to limit trial to an Italian forum as "different in kind" from the entitlement to "avoid suit altogether" that *Abney* and *Mitchell* held could be "adequately vindica[ted]" only on immediate appeal. 490 U. S., at 501.

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[4] That reasoning echoed our decision one Term earlier in *Van Cauwenberghe* v. *Biard,* 486 U. S. 517 (1988), where we unanimously rejected the contention that a defendant brought to the United States under an extradition treaty could appeal immediately under § 1291 from a decision denying a motion to dismiss based on the principle of "specialty," which he asserted immunized him from service of civil process in the United States. Even if such an immunity might supply a basis for vacating a judgment on appeal, we held, the right "should be characterized as the right not to be subject to a binding judgment of the court," and so understood, it could therefore "be effectively vindicated following final judgment." *Id.,* at 526–527.

E

As Digital reads the cases, the only things standing in the way of an appeal to perfect its claimed rights under the settlement agreement are the lone statement in *Midland Asphalt,* to the effect that only explicit statutory and constitutional immunities may be appealed immediately under § 1291, and language (said to be stray) repeated in many of our collateral order decisions, suggesting that the "importance" of the right asserted is an independent condition of appealability. See Brief for Petitioner 28–34. The first, Digital explains, cannot be reconciled with *Mitchell's* holding, that denial of qualified immunity (which we would be hard pressed to call "explicitly . . . guarantee[d]" by a particular constitutional or statutory provision) is a collateral order under § 1291; as between *Mitchell* and the *Midland Asphalt* dictum, Digital says, the dictum must give way. As for the second obstacle, Digital adamantly maintains that "importance" has no place in a doctrine justified as supplying a gloss on Congress's "final decision" language.

1

These arguments miss the mark. First, even if *Mitchell* could not be squared fully with the literal words of the *Midland Asphalt* sentence (but cf. *Lauro Lines,* 490 U. S., at 499, noting that *Midland Asphalt* was a criminal case and *Mitchell* was not), that would be only because the qualified immunity right is inexplicit, not because it lacks a good pedigree in public law. Indeed, the insight that explicitness may not be needed for jurisdiction consistent with § 1291 only leaves Digital with the unenviable task of explaining why other rights that might fairly be said to include an (implicit) "right to avoid trial" aspect are less in need of protection by immediate review, or more readily vindicated on appeal from final judgment, than the (claimed) privately negotiated right to be free from suit. It is far from clear, for example, why § 1291 should bless a party who bargained for the right to avoid trial, but not a party who "purchased" the right by having once prevailed at trial and now pleads res judicata, see *In re Corrugated Container Antitrust Litigation* v. *Willamette Industries, Inc.*, 694 F. 2d 1041 (CA5 1983); or a party who seeks shelter under the statute of limitations, see, *e. g.*, *United States* v. *Weiss*, 7 F. 3d 1088 (CA2 1993), which is usually understood to secure the same sort of "repose" that Digital seeks to vindicate here, see Brief for Petitioner 25; or a party not even subject to a claim on which relief could be granted. See also *Cobbledick*, 309 U. S., at 325 ("Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship"); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 378 (1981) ("[P]otential harm" should be compared to "the harm resulting from other interlocutory orders that may be erroneous") (internal quotation marks omitted).

Digital answers that the status under § 1291 of these other (seemingly analogous) rights should not give us pause, because the text and structure of this particular settlement with Desktop confer what no res judicata claimant could ever have, an express right not to stand trial.[5] But we cannot attach much significance one way or another to the supposed clarity of the agreement's terms in this case. To ground a ruling here on whether this settlement agreement in terms confers the prized "right not to stand trial" (a point Desktop by no means concedes) would flout our own frequent admonitions, see, *e. g.*, *Van Cauwenberghe*, 486 U. S., at 529, that availability of collateral order appeal must be determined at a higher level of generality. Indeed, just because it would be the rare settlement agreement that could not be construed to include (at least an implicit) freedom-from-trial "aspect," we decide this case on the assumption that if Digital prevailed here, any district court order denying effect to a settlement agreement could be appealed immediately. (And even if form were held to matter, settlement agreements would all include "immunity from suit" language a good deal plainer than what Digital relies on here, see Tr. of Oral Arg. 44.) See also *Van Cauwenberghe, supra,* at 524 ("For purposes of determining appealability, . . . we will assume, but do not decide, that petitioner has presented a substantial claim" on the merits).[6]

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[5] But cf. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429–430 (1934) ("'[T]he laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to . . . in its terms'") (quoting *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, 550 (1867)).

2

The more fundamental response, however, to the claim that an agreement's provision for immunity from trial can distinguish it from other arguable rights to be trial free is simply that such a right by agreement does not rise to the level of importance needed for recognition under § 1291. This, indeed, is the bone of the fiercest contention in the case. In disparaging any distinction between an order denying a claim grounded on an explicit constitutional guarantee of immunity from trial and an order at odds with an equally explicit right by private agreement of the parties, Digital stresses that the relative "importance" of these rights, heavily relied upon by the Court of Appeals, is a rogue factor. No decision of this Court, Digital maintains, has held an order unappealable as "unimportant" when it has otherwise met the three *Cohen* requirements, and whether a decided issue is thought "important," it says, should have no bearing on whether it is "final" under § 1291.

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[6] Similarly, we must reject as patently irrelevant for § 1291 purposes Digital's repeated claims that the District Court applied the "wrong legal standard" in granting Desktop's motion to vacate the dismissal order. If Digital is right that a settlement agreement confers a contractual "immunity from suit," that protection is no more "irretrievably lost," and thus no more appealable under § 1291, when a district court applies an erroneous legal standard than when it commits a plain vanilla mistake in misapplying the proper standard.

Nor do we accept uncritically Digital's novel and highly convenient contention that such a right to be free from trial is, either in this case or generally, more valuable than other rights conferred by a settlement agreement. See *infra,* at 881–882. While Digital emphasizes that, under the terms of the settlement here, Desktop is owed a larger sum for "dismissal of the above referenced lawsuit and a waiver of all damages" than for "all rights to the Trademarks," that proves little, if anything. To compare those two amounts is to place the bargained-for damages waiver on the wrong side of the ledger: that (typically quite valuable) right is precisely the sort that is fully vindicable on postjudgment appeal. Moreover, even if a high price tag might otherwise be an indicator of a right's "importance" to the benefited party, we cannot ignore that settlement agreement "prices" may be structured for tax, accounting, and business strategy reasons that have nothing to do with their true value to the party.

If "finality" were as narrow a concept as Digital maintains, however, the Court would have had little reason to go beyond the first factor in *Cohen,* see also *United States* v. *243.22 Acres of Land in Babylon, Suffolk Cty.*, 129 F. 2d 678, 680 (CA2 1942) (Frank, J.) ("'Final' is not a clear one-purpose word"). And if "importance" were truly aberrational, we would not find it featured so prominently in the *Cohen* opinion itself, which describes the "small class" of immediately appealable prejudgment decisions in terms of rights that are "too important to be denied review" right away, see 337 U. S., at 546. To be sure, Digital may validly question whether "importance" is a factor "beyond" the three *Cohen* conditions or whether it is best considered, as we have sometimes suggested it should be, in connection with the second, "separability," requirement, see, *e. g., Coopers & Lybrand,* 437 U. S., at 468; *Lauro Lines,* 490 U. S., at 498, but neither enquiry could lead to the conclusion that "importance" is itself unimportant. To the contrary, the third *Cohen* question, whether a right is "adequately vindicable" or "effectively reviewable," simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement. See generally *Van Cauwenberghe, supra,* at 524 ("'[T]he substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner,'" is dispositive) (quoting *MacDonald,* 435 U. S., at 860, n. 7); *Lauro Lines, supra,* at 502–503 (SCALIA, J., concurring).

While there is no need to decide here that a privately conferred right could never supply the basis of a collateral order appeal, but cf. n. 7, *infra* (discussing 9 U. S. C. § 16), there are surely sound reasons for treating such rights differently from those originating in the Constitution or statutes. When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its "importance." Including a provision in a private contract, by contrast, is barely a prima facie indication that the right secured is "important" to the benefited party (contracts being replete with boilerplate), let alone that its value exceeds that of other rights not embodied in agreements (*e. g.,* the right to be free from a second suit based on a claim that has already been litigated), or that it qualifies as "important" in *Cohen*'s sense, as being weightier than the societal interests advanced by the ordinary operation of final judgment principles. Where statutory and constitutional rights are concerned, "irretrievabl[e] los[s]" can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law, see, *e. g., Ruckelshaus* v. *Monsanto Co.,* 467 U. S. 986, 1018 (1984); *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson,* 255 U. S. 407, 437–438 (1921) (Holmes, J., dissenting). But it is one thing to say that the policy of § 1291 to avoid piecemeal litigation should be reconciled with policies embodied in other statutes or the Constitution, and quite another to suggest that this public policy may be trumped routinely by the expectations or clever drafting of private parties.[7]

Indeed, we do not take issue with the Tenth Circuit's observation that this case shares more in common with *Lauro Lines* than with *Mitchell.* It is hard to see how, for purposes of § 1291, the supposedly explicit "right not to be tried" element of the settlement agreement in this case differs from the unarguably explicit, privately negotiated "right not to be tried in any forum other than Naples, Italy," in that one. There, no less than here (if Digital reads the settlement agreement correctly), one private party secured from another a promise not to bring suit for reasons that presumably included avoiding the burden, expense, and perhaps embarrassment of a certain class of trials (all but Neapolitan ones or, here, all prompted by Desktop). Cf. *Lauro Lines, supra,* at 501 (asserted right was "surely as effectively vindicable" on final judgment appeal as was the right in *Van Cauwenberghe).*[8] The losing argument in *Lauro Lines* should be a losing argument here.

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[7] This is not to say that rights originating in a private agreement may never be important enough to warrant immediate appeal. To the contrary, Congress only recently enacted a statute, 102 Stat. 4671, see 9 U. S. C. § 16 (1988 ed., Supp. IV), essentially providing for immediate appeal when a district court rejects a party's assertion that, under the Arbitration Act, a case belongs before a commercial arbitrator and not in court, a measure predicted to have a "sweeping impact," 15B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.17, p. 11 (1992); see generally *id.*, at 7–38. That courts must give full effect to this express congressional judgment that particular policies require that private rights be vindicable immediately, however, by no means suggests that they should now be more ready to make similar judgments for themselves. Congress has expressed no parallel sentiment, to the effect that settlement-agreement rights are, as a matter of federal policy, similarly "too important" to be denied immediate review.

[8] To be fair, the *Lauro Lines* opinion does contain language that, taken alone, might lend succor to petitioner's claim, see 490 U. S., at 501 ("[A]n entitlement to avoid suit is different in kind from an entitlement to be sued only in a particular forum"), but the opinion is not easily read as

Nor are we swayed by Digital's last-ditch effort to come within *Cohen's* sense of "importance" by trying to show that settlement-agreement "immunities" merit first-class treatment for purposes of collateral order appeal, because they advance the public policy favoring voluntary resolution of disputes. It defies common sense to maintain that parties' readiness to settle will be significantly dampened (or the corresponding public interest impaired) by a rule that a district court's decision to let allegedly barred litigation go forward may be challenged as a matter of right only on appeal from a judgment for the plaintiff's favor.

III

A

Even, finally, if the term "importance" were to be exorcised from the *Cohen* analysis altogether, Digital's rights would remain "adequately vindicable" or "effectively reviewable" on final judgment to an extent that other immunities, like the right to be free from a second trial on a criminal charge, are not. As noted already, experience suggests that freedom from trial is rarely the *sine qua non* (or "the essence," see *Van Cauwenberghe*, 486 U. S., at 525) of a negotiated settlement agreement. Avoiding the burden of a trial is no doubt a welcome incident of out-of-court dispute resolution (just as it is for parties who prevail on pretrial motions), but in the run-of-the-mill cases this boon will rarely compare with the " 'embarrassment' " and " 'anxiety' " averted by a successful double jeopardy claimant, see *Abney*, 431 U. S., at 661–662, or the " 'distraction from . . . dut[y],' " *Mitchell*, 472

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endorsing Digital's claim that a privately negotiated right not to stand trial would be immediately appealable. To the contrary, *Lauro Lines* expressly adopted (at least for criminal appeals) *Midland Asphalt's* limitation that " '[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee,' " 490 U. S., at 499, quoting 489 U. S., at 801, and stated that the collateral order doctrine operates "[s]imilarly" in civil cases, 490 U. S., at 499.

U. S., at 526, avoided by qualified immunity. Judged within the four corners of the settlement agreement, avoiding trial probably pales in comparison with the benefit of limiting exposure to liability (an interest that is fully vindicable on appeal from final judgment). In the rare case where a party had a special reason, apart from the generic desire to triumph early, for having bargained for an immunity from trial, *e. g.*, an unusual interest in preventing disclosure of particular information, it may seek protection from the district court.

The case for adequate vindication without immediate appeal is strengthened, moreover, by recognizing that a settling party has a source of recompense unknown to trial immunity claimants dependent on public law alone. The essence of Digital's claim here is that Desktop, for valuable consideration, promised not to sue, and we have been given no reason to doubt that Utah law provides for the enforcement of that promise in the same way that other rights arising from private agreements are enforced, through an action for breach of contract. See, *e. g., VanDyke* v. *Mountain Coin Machine Distributors, Inc.*, 758 P. 2d 962 (Utah App. 1988) (upholding compensatory and punitive damages award against party pursuing suit in the face of settlement agreement); see generally 5A A. Corbin, Corbin on Contracts § 1251 (1964); cf. *Yockey* v. *Horn*, 880 F. 2d 945, 947 (CA7 1989) (awarding damages for breach of settlement agreement promise not to "participate in any litigation" against plaintiff); see also *Richardson-Merrell*, 472 U. S., at 435, and n. 2 (existence of alternative fora for vindicating asserted rights is relevant to appealability under § 1291). And as for Digital's suggestion, see Brief for Petitioner 25, that Desktop is using this proceeding not to remedy a fraud but merely to renege on a promise because it now thinks it should have negotiated a better deal, when a party claims fraud or otherwise seeks recision of a settlement for such improper purposes, its opponent need not rely on a court of appeals for protection. See

Fed. Rule Civ. Proc. 11 (opponent may move for sanction when litigation is motivated by an "improper purpose, such as . . . unnecessary delay or needless increase in the cost of litigation").

B

In preserving the strict limitations on review as of right under § 1291, our holding should cause no dismay, for the law is not without its safety valve to deal with cases where the contest over a settlement's enforceability raises serious legal questions taking the case out of the ordinary run. While Digital's insistence that the District Court applied a fundamentally wrong legal standard in vacating the dismissal order here may not be considered in deciding appealability under § 1291, see n. 6, *supra,* it plainly is relevant to the availability of the discretionary interlocutory appeal from particular district court orders "involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion," provided for in § 1292(b) of Title 28. Indeed, because we suppose that a defendant's claimed entitlement to a privately negotiated "immunity from suit" could in some instances raise "a controlling question of law . . . [which] . . . may materially advance the ultimate termination of the litigation," the discretionary appeal provision (allowing courts to consider the merits of individual claims) would seem a better vehicle for vindicating serious contractual interpretation claims than the blunt, categorical instrument of § 1291 collateral order appeal. See *Van Cauwenberghe,* 486 U. S., at 529–530 (internal quotation marks omitted); *Coopers & Lybrand,* 437 U. S., at 474–475.[9]

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[9] We recognize that § 1292 is not a panacea, both because it depends to a degree on the indulgence of the court from which review is sought and because the discretion to decline to hear an appeal is broad, see, *e. g., Coopers & Lybrand,* 437 U. S., at 475 (serious docket congestion may be adequate reason to support denial of certified appeal). On the other hand, we find nothing in the text or purposes of either statute to justify the concern, expressed here by Digital, that a party's request to appeal under

IV

The words of § 1291 have long been construed to recognize that certain categories of prejudgment decisions exist for which it is both justifiable and necessary to depart from the general rule, that "the whole case and every matter in controversy in it [must be] decided in a single appeal." *McLish* v. *Roff,* 141 U. S. 661, 665–666 (1891). But denying effect to the sort of (asserted) contractual right at issue here is far removed from those immediately appealable decisions involving rights more deeply rooted in public policy, and the rights Digital asserts may, in the main, be vindicated through means less disruptive to the orderly administration of justice than immediate, mandatory appeal. We accordingly hold that a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291. The judgment of the Court of Appeals is therefore

Affirmed.

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§ 1292(b) might operate, practically or legally, to prejudice its claimed right to immediate appeal under § 1291.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 884 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 28 THROUGH JUNE 7, 1994

MARCH 28, 1994

Certiorari Granted—Vacated and Remanded

No. 92–6259. ADAMS *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Petition for rehearing granted, and the order entered June 14, 1993 [508 U. S. 974], denying the petition for writ of certiorari is vacated. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sullivan* v. *Louisiana,* 508 U. S. 275 (1993). Reported below: 965 F. 2d 1306.

No. 92–8656. AVAKIAN *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Granderson, ante,* p. 39. Reported below: 980 F. 2d 738.

No. 93–753. NORTH CAROLINA *v.* BRYANT; and NORTH CAROLINA *v.* WILLIAMS. Sup. Ct. N. C. Motions of respondents Marvin Earl Williams and Kenneth Michael Bryant for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Victor* v. *Nebraska, ante,* p. 1. Reported below: 334 N. C. 333, 432 S. E. 2d 291 (first case); 334 N. C. 440, 434 S. E. 2d 588 (second case).

No. 93–6913. HILL *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Granderson, ante,* p. 39. Reported below: 5 F. 3d 528.

Miscellaneous Orders

No. D–1338. IN RE DISBARMENT OF SACKS. Disbarment entered. [For earlier order herein, see 510 U. S. 1034.]

No. D–1341. IN RE DISBARMENT OF CULLEN. Disbarment entered. [For earlier order herein, see 510 U. S. 1035.]

No. D–1342. In re Disbarment of Kole. Disbarment entered. [For earlier order herein, see 510 U. S. 1035.]

No. D–1343. In re Disbarment of Koprowski. Disbarment entered. [For earlier order herein, see 510 U. S. 1035.]

No. D–1344. In re Disbarment of Johnson. Disbarment entered. [For earlier order herein, see 510 U. S. 1035.]

No. D–1345. In re Disbarment of Krohn. Disbarment entered. [For earlier order herein, see 510 U. S. 1035.]

No. D–1347. In re Disbarment of Conaway. Disbarment entered. [For earlier order herein, see 510 U. S. 1036.]

No. D–1348. In re Disbarment of Bailey. Disbarment entered. [For earlier order herein, see 510 U. S. 1036.]

No. D–1352. In re Disbarment of Hulnick. Disbarment entered. [For earlier order herein, see 510 U. S. 1069.]

No. D–1354. In re Disbarment of Micks. Disbarment entered. [For earlier order herein, see 510 U. S. 1069.]

No. D–1374. In re Disbarment of Heitmann. It is ordered that Harold P. Heitmann, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1375. In re Disbarment of McNamara. It is ordered that Warren Harding McNamara, Jr., of Newport News, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1376. In re Disbarment of Nath. It is ordered that Jack Nath, of New Hyde Park, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93–714. U. S. Bancorp Mortgage Co. *v.* Bonner Mall Partnership. C. A. 9th Cir. [Certiorari granted, 510 U. S. 1039.] Case removed from the April 1994 argument calendar.

Memorandum of respondent suggesting that the case is moot filed March 15, 1994, is set for briefing and oral argument in accordance with Rules 24, 25, and 28 of the Rules of this Court. The parties are directed to brief and argue the following question: "Should the rule announced in *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950), extend to cases that become moot in this Court because of the voluntary settlement of the parties?"

No. 93-1284. HOECHST CELANESE CORP. ET AL. *v.* GILLIS ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 93-7745. JOHNSON *v.* JOHNSON. Super. Ct. N. J., App. Div. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 18, 1994, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 93-7767. IN RE MADSEN. Petition for writ of mandamus denied.

No. 93-7740. IN RE CORETHERS; and
No. 93-7794. IN RE CORETHERS. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 93-7901. SCHLUP *v.* DELO, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 11 F. 3d 738.

Certiorari Denied

No. 93-830. DAVIS SUPERMARKETS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 2 F. 3d 1162.

No. 93-850. ORTIZ-CAMERON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 996 F. 2d 436.

No. 93-1058. BENNETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 999 F. 2d 548.

No. 93–1063. HAYWARD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 6 F. 3d 1241.

No. 93–1074. CELLSWITCH L. P. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 998 F. 2d 1051.

No. 93–1081. GILLIS ET AL. *v.* HOECHST CELANESE CORP. C. A. 3d Cir. Certiorari denied. Reported below: 4 F. 3d 1137.

No. 93–1097. CHESLEREAN *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 1 F. 3d 1240.

No. 93–1105. COLORADO DEPARTMENT OF HEALTH ET AL. *v.* BAUMAN ET AL. Ct. App. Colo. Certiorari denied. Reported below: 857 P. 2d 499.

No. 93–1106. JACKSON *v.* NEW YORK CITY POLICE DEPARTMENT ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 192 App. Div. 2d 641, 596 N. Y. S. 2d 457.

No. 93–1152. GARRATT *v.* MORRIS ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 443 Mich. 105, 503 N. W. 2d 654.

No. 93–1204. EAGLEYE *v.* TRW, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 4 F. 3d 417.

No. 93–1218. THOMAS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 110.

No. 93–1240. BRITT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 959 F. 2d 232.

No. 93–1245. ODECO OIL & GAS CO., DRILLING DIVISION, ET AL. *v.* BONNETTE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 4 F. 3d 401.

No. 93–1255. MORRIS COUNTY *v.* PHILIPPEN. Super. Ct. N. J., App. Div. Certiorari denied.

No. 93–1256. HAYDEN *v.* LA-Z-BOY CHAIR CO. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 617.

No. 93–1257. CATLETT *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 93–1258. WILLIS *v.* DEBRUYN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 556.

No. 93–1262. TIEMEYER ET AL. *v.* COMMUNITY MUTUAL INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 8 F. 3d 1094.

No. 93–1263. BERNARD *v.* CONNICK, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS NEW ORLEANS DISTRICT ATTORNEY. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 103.

No. 93–1264. COWAN *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 260 Mont. 510, 861 P. 2d 884.

No. 93–1266. CASADOS ET AL. *v.* CITY AND COUNTY OF DENVER, COLORADO, ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 862 P. 2d 908.

No. 93–1268. NEW MEXICO ENVIRONMENT DEPARTMENT *v.* FRANCO, SUCCESSOR TRUSTEE FOR THE ESTATE OF L. F. JENNINGS OIL CO. C. A. 10th Cir. Certiorari denied. Reported below: 4 F. 3d 887.

No. 93–1269. YOUNG IN HONG *v.* CHILDREN'S MEMORIAL HOSPITAL. C. A. 7th Cir. Certiorari denied. Reported below: 993 F. 2d 1257.

No. 93–1270. CALIFORNIA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (PARR ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 93–1273. YOUNGER *v.* YOUNGER. Super. Ct. Ga., Chatham County. Certiorari denied.

No. 93–1274. KAGAN *v.* EL SAN HOTEL & CASINO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 7 F. 3d 218.

No. 93–1288. ELLENBECKER, SECRETARY, SOUTH DAKOTA DEPARTMENT OF SOCIAL SERVICES, ET AL. *v.* HOWE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 8 F. 3d 1258.

No. 93–1289. ROGERS *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 29.

No. 93–1295. SPALETTA *v.* CALIFORNIA WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–1304. MCVAY *v.* PARRISH. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 76.

No. 93–1311. BURCHILL *v.* KISH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 46.

No. 93–1352. EDWARDS *v.* WILSON ET AL. C. A. 9th Cir. Certiorari denied.

No. 93–6257. CULVER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–6635. REED *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–6900. METZGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 3 F. 3d 756.

No. 93–7067. HASSAN EL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 5 F. 3d 726.

No. 93–7299. RICHARDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 1542.

No. 93–7315. FAVORITO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 1338.

No. 93–7346. LAYNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 6 F. 3d 396.

No. 93–7355. COBLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 1043.

No. 93–7404. SAMRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–7623. MILLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 4 F. 3d 1038.

No. 93–7652. DAVIS *v.* RESOLUTION TRUST CORPORATION ET AL. Ct. App. Ga. Certiorari denied. Reported below: 208 Ga. App. 884, 433 S. E. 2d 143.

No. 93–7669. TERRELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7672. SHELTON ET AL. *v.* EBERHARDT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 7 F. 3d 220.

No. 93–7685. DOYLE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 615 So. 2d 278.

No. 93–7686. SULLIVAN *v.* FLANNIGAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 591.

No. 93–7698. ESPARZA *v.* WOODS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 23.

No. 93–7709. LONG *v.* JENKINS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 213.

No. 93–7715. GASSAWAY *v.* CODY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 116.

No. 93–7716. GIFFORD ET UX. *v.* NATIONAL BANK OF SOUTH DAKOTA, CITY OF PRESHO, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 114.

No. 93–7721. SANFORD *v.* ALAMEDA-CONTRA COSTA TRANSIT DISTRICT ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7723. SWEENEY *v.* CIVIL SERVICE COMMISSION. Commw. Ct. Pa. Certiorari denied. Reported below: 147 Pa. Commw. 707, 609 A. 2d 216.

No. 93–7727. SNYDER *v.* LOVE. C. A. 3d Cir. Certiorari denied.

No. 93–7728. WILLIAMS *v.* PINE BLUFF SCHOOL DISTRICT NO. 3 ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 14 F. 3d 610.

No. 93–7731. ESPARZA *v.* PAROLE PANEL. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 23.

No. 93–7735. FRIEDMAN *v.* DEAR ET AL. C. A. 2d Cir. Certiorari denied.

No. 93–7736. TYLER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, ET AL. C. A. 8th Cir. Certiorari denied.

No. 93–7746. CONDON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 597 A. 2d 7.

No. 93–7750. MILLER *v.* ROWLAND, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 999 F. 2d 389.

No. 93–7751. NUNNALLY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 251 Ill. App. 3d 1107, 661 N. E. 2d 1199.

No. 93–7752. LYLE *v.* MCKEON. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 108.

No. 93–7753. ROGERS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 109 N. C. App. 491, 428 S. E. 2d 220.

No. 93–7754. MOSLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 93–7755. MAGULA *v.* INFANTE ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 629 So. 2d 134.

No. 93–7756. O'MURCHU *v.* RENO, ATTORNEY GENERAL OF THE UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 93–7757. LIGHT *v.* KIRK, JUDGE. Sup. Ct. Tex. Certiorari denied.

No. 93–7764. SHANTEAU *v.* DEPARTMENT OF SOCIAL SERVICES. Ct. App. Mich. Certiorari denied.

No. 93–7768. PREUSS *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 93–7771. FIGUEROA *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–7772. GASTER *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93-7773. BOOTHE *v.* STANTON. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 93-7774. BYNUM *v.* STATE FARM INSURANCE CO. Ct. App. Ga. Certiorari denied. Reported below: 208 Ga. App. XXVII.

No. 93-7775. HOOD *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 594.

No. 93-7776. BYERS *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 261 Mont. 17, 861 P. 2d 860.

No. 93-7789. KELLY *v.* MUNICIPAL COURT OF CALIFORNIA, COUNTY OF SAN MATEO. C. A. 9th Cir. Certiorari denied.

No. 93-7790. JONES *v.* SNYDER, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 93-7791. HARPER *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 93-7792. ELINE *v.* BISHOP ESTATE ET AL. C. A. 9th Cir. Certiorari denied.

No. 93-7800. GARCIA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 634 So. 2d 624.

No. 93-7806. PITTS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93-7819. BROWN *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 1102.

No. 93-7822. CORETHERS *v.* FRIEDMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 93-7827. GATES, AKA HAYES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 988 F. 2d 1218.

No. 93-7830. DILLARD *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 209.

No. 93-7831. MACK *v.* KENZIE ET AL. C. A. 2d Cir. Certiorari denied.

No. 93–7844. FLYNN *v.* CITY OF GARDEN CITY, MICHIGAN, ET AL.; and FLYNN *v.* B&T TOWING. Ct. App. Mich. Certiorari denied.

No. 93–7845. MESSERSCHMIDT *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 14 F. 3d 613.

No. 93–7909. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 822.

No. 93–7951. LODEIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–7965. VISINTINE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 236.

No. 93–7967. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 1377.

No. 93–7981. MCQUEEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–7982. MULHOLLAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–7988. KEEPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 6 F. 3d 1088.

No. 93–7991. GALLARDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1091.

No. 93–7993. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 93–8003. MCCOWAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93–8004. OMECTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8005. RAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 10 F. 3d 810.

No. 93–8015. KREUZHAGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 93–8016. ALVAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 6 F. 3d 287.

No. 93–8017. Adams *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 30.

No. 93–8019. Califano *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 592.

No. 93–8021. Correll *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–8026. Llerena-Acosta *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 3 F. 3d 1496.

No. 93–8028. Lux et ux. *v.* Spotswood Construction Loans, L. P. Sup. Ct. Va. Certiorari denied.

No. 93–8036. Childs *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 1328.

No. 93–8042. Sanchez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–8052. Robinson *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 10 F. 3d 79.

No. 93–8064. Freeman *v.* Idaho Commission for Pardons and Parole. C. A. 9th Cir. Certiorari denied. Reported below: 999 F. 2d 542.

No. 93–52. United States *v.* Clay. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 982 F. 2d 959.

No. 93–1095. Rivera *v.* United States. C. A. 2d Cir. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Certiorari denied. Reported below: 4 F. 3d 1038.

No. 93–1250. Chandler et al. *v.* City of Dallas. C. A. 5th Cir. Motion of Advocacy Inc. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 2 F. 3d 1385.

No. 93–1259. Martin *v.* Omega Medical Center Associates et al. C. A. 3d Cir. Motion of petitioner to consolidate petition for writ of certiorari with other cases denied. Certiorari denied.

No. 93–5784. HOFFMAN *v.* IDAHO. Sup. Ct. Idaho;
No. 93–6885. WILLIAMS *v.* ALABAMA. Sup. Ct. Ala.;
No. 93–7075. CORAL *v.* ALABAMA. Sup. Ct. Ala.;
No. 93–7247. OGAN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–7269. TUCKER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–7317. JONES *v.* ILLINOIS. Sup. Ct. Ill.;
No. 93–7331. BEHRINGER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–7423. JENKINS *v.* ALABAMA. Sup. Ct. Ala.;
No. 93–7482. MORENO *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–7648. DUBOIS *v.* VIRGINIA. Sup. Ct. Va.; and
No. 93–7778. YOUNG *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: No. 93–5784, 123 Idaho 638, 851 P. 2d 934; No. 93–6885, 627 So. 2d 999; No. 93–7075, 628 So. 2d 1004; No. 93–7317, 156 Ill. 2d 225, 620 N. E. 2d 325; No. 93–7423, 627 So. 2d 1054; No. 93–7648, 246 Va. 260, 435 S. E. 2d 636; No. 93–7778, 536 Pa. 57, 637 A. 2d 1313.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 92–6259, *supra,* p. 1001.)

Rehearing Denied

No. 93–6638. PHELPS *v.* LOCKHEED MISSILES & SPACE CO., INC., 510 U. S. 1054;

No. 93–6644. RANDALL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 510 U. S. 1095;

No. 93–6786. KENNEDY *v.* LITTLE ET AL., 510 U. S. 1076;

No. 93–6841. RADFORD, PERSONAL REPRESENTATIVE OF THE ESTATE OF RADFORD, DECEASED *v.* CHEVRON, U. S. A., INC., 510 U. S. 1095;

No. 93–6910. JACKSON *v.* WISNESKI, 510 U. S. 1062;

No. 93–7073. CORETHERS *v.* KMIECIK ET AL., 510 U. S. 1124;

No. 93–7187. PORTER *v.* MICHAEL REESE HOSPITAL & MEDICAL CENTER, 510 U. S. 1127;

No. 93–7188. RICHMOND *v.* WATERS, WARDEN, ET AL., 510 U. S. 1127;

No. 93–7193. THAKKAR *v.* DEBEVOISE, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 510 U. S. 1127;

No. 93–7224. THOMAS *v.* NATIONAL UNION FIRE INSURANCE CO. ET AL., 510 U. S. 1129; and

No. 93–7657. LAWSON *v.* DIXON, WARDEN, 510 U. S. 1171. Petitions for rehearing denied.

No. 92–1953. RAYMOND ET AL. *v.* MOBIL OIL CORP., 510 U. S. 822. Motion for leave to file petition for rehearing denied.

No. 92–8822. JOHNSON *v.* CALIFORNIA, 510 U. S. 836. Petition for rehearing denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the petition for rehearing.

MARCH 30, 1994

Certiorari Denied

No. 93–8522 (A–812). WEBB *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentence in this case.

MARCH 31, 1994

Dismissal Under Rule 46

No. 93–8102. MCMILLAN *v.* HOLLAND, WARDEN. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.2.

Certiorari Denied

No. 93–8542 (A–817). HANCE *v.* ZANT, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. The order heretofore entered by JUSTICE KENNEDY is vacated. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution.

JUSTICE BLACKMUN, dissenting.

Even if I had not reached the conclusion that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I could not support its imposition in this case. There is substantial evidence that William Henry Hance is mentally retarded as well as mentally ill. There is reason to believe that his trial and sentencing proceedings were infected with racial prejudice. One of his sentencers has come forward to say that she did not vote for the death penalty because of his mental impairments. And Mr. Hance has raised a colorable claim that the trial court's refusal to answer his jurors' questions about sentencing options should be held and considered in light of the forthcoming decision in *Simmons* v. *South Carolina*, No. 92-9059, pending before this Court. Accordingly, I would grant the application for a stay, grant the petition for writ of certiorari, and vacate the death sentence in this case.

APRIL 3, 1994

Certiorari Dismissed

No. 93-8492 (A-809). LAMBERTY, AS NEXT FRIEND TO BEAVERS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari dismissed for want of jurisdiction. JUSTICE STEVENS and JUSTICE GINSBURG would deny the petition for writ of certiorari.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93-8565 (A-820). BEAVERS, BY AND THROUGH HIS NEXT FRIEND, LAMBERTY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT of Criminal Justice, Institutional Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari dismissed for want of jurisdiction. Justice Ginsburg would deny the petition for writ of certiorari. Justice Stevens would grant the application for stay of execution.

Justice Blackmun, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

April 4, 1994

Miscellaneous Orders

No. ———. Byrd *v.* Ohio; Greer *v.* Ohio; Henderson *v.* Ohio; Hicks *v.* Ohio; Jamison *v.* Ohio; Montgomery *v.* Ohio; Poindexter *v.* Ohio; Scott *v.* Ohio; and Sowell *v.* Ohio. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by Jay D. Scott granted.

No. ———. Kost *v.* United States; and
No. ———. Fuller *v.* Norfolk Southern Corp. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. D–1351. In re Disbarment of Venable. William H. C. Venable, of Richmond, Va., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 10, 1994 [510 U. S. 1036], is hereby discharged.

No. D–1377. In re Disbarment of Spence. It is ordered that Jeffrey Dale Spence, of Seattle, Wash., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1378. In re Disbarment of Wade. It is ordered that Julius Jennings Wade, Jr., of Charlotte, N. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1379. In re Disbarment of Fresco. It is ordered that Mark G. Fresco, of Spring Valley, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1380. In re Disbarment of Cooper. It is ordered that Arthur Bryan Cooper, of Eaton Town, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 92–1920. Livadas *v.* Aubry, California Labor Commissioner. C. A. 9th Cir. [Certiorari granted, 510 U. S. 1083.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General to permit Malcolm L. Stewart, Esq., to present oral argument *pro hac vice* granted.

No. 93–518. Dolan *v.* City of Tigard. Sup. Ct. Ore. [Certiorari granted, 510 U. S. 989.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 93–880. Madsen et al. *v.* Women's Health Center, Inc., et al. Sup. Ct. Fla. [Certiorari granted, 510 U. S. 1084.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93–7809. In re Bennett et al. Petition for writ of prohibition denied.

Certiorari Granted

No. 93–1251. Shalala, Secretary of Health and Human Services *v.* Guernsey Memorial Hospital. C. A. 6th Cir. Certiorari granted. Reported below: 996 F. 2d 830.

No. 93–1103. Dubuque Packing Co., Inc. *v.* United Food & Commercial Workers International Union AFL–CIO, Local No. 150–A, et al. C. A. D. C. Cir. Certiorari granted.

Justice Ginsburg took no part in the consideration or decision of this petition. Reported below: 1 F. 3d 24.

No. 93–1128. Brown, Secretary of Veterans Affairs *v.* Gardner. C. A. Fed. Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 5 F. 3d 1456.

No. 93–1286. American Airlines, Inc. *v.* Wolens et al. Sup. Ct. Ill. Motion of Air Transport Association of America for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 157 Ill. 2d 466, 626 N. E. 2d 205.

No. 93–7407. O'Neal *v.* McAninch, Warden. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 2 presented by the petition. Reported below: 3 F. 3d 143.

Certiorari Denied

No. 93–1055. Shane *v.* Resolution Trust Corporation, as Receiver of Mercury Savings & Loan Assn. C. A. 9th Cir. Certiorari denied. Reported below: 996 F. 2d 1227.

No. 93–1062. Recall '92, Inc., et al. *v.* Edwards, Governor of Louisiana, et al. C. A. 5th Cir. Certiorari denied. Reported below: 2 F. 3d 117.

No. 93–1070. Skipper, Sheriff of Multnomah County *v.* Reuter. C. A. 9th Cir. Certiorari denied. Reported below: 4 F. 3d 716.

No. 93–1124. Arkansas Peace Center et al. *v.* Arkansas Department of Pollution Control and Ecology et al. C. A. 8th Cir. Certiorari denied. Reported below: 999 F. 2d 1212.

No. 93–1198. Ross et al. *v.* ZVI Trading Corp. Employees' Money Purchase Pension Plan and Trust et al.; and

No. 93–1357. ZVI Trading Corp. Employees' Money Purchase Pension Plan and Trust et al. *v.* Ross et al. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 259.

No. 93–1278. County of Berks, Pennsylvania, et al. *v.* Murtagh et al. Sup. Ct. Pa. Certiorari denied. Reported below: 535 Pa. 50, 634 A. 2d 179.

No. 93-1283. CINEL *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 619 So. 2d 770.

No. 93-1291. FLACK *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 17 Cal. App. 4th 940, 21 Cal. Rptr. 2d 796.

No. 93-1292. PURIFICATO ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 290.

No. 93-1294. GIBSON ET AL. *v.* DALLAS COUNTY EDUCATION DISTRICT. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-1296. DISTRICT OF COLUMBIA ET AL. *v.* KATTAN, BY HER PARENTS AND NEXT FRIENDS, THOMAS ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 995 F. 2d 274.

No. 93-1297. LEBLANC *v.* GREAT AMERICAN INSURANCE CO. C. A. 1st Cir. Certiorari denied. Reported below: 6 F. 3d 836.

No. 93-1298. HALL ET AL. *v.* MARTIN ET AL. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 851 S. W. 2d 905.

No. 93-1299. SUNDANCE CRUISES CORP. ET AL. *v.* AMERICAN BUREAU OF SHIPPING. C. A. 2d Cir. Certiorari denied. Reported below: 7 F. 3d 1077.

No. 93-1300. SELLICK EQUIPMENT, INC. *v.* BOUTTE. C. A. 5th Cir. Certiorari denied.

No. 93-1302. BEARD *v.* WEST, SECRETARY OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1070.

No. 93-1303. CHICAGO TRUCK DRIVERS, HELPERS & WAREHOUSE WORKERS UNION (INDEPENDENT) PENSION FUND ET AL. *v.* SLOTKY. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1251.

No. 93-1306. CONVERTINO *v.* WRIGHT, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1543.

No. 93-1308. CORN *v.* CITY OF LAUDERDALE LAKES. C. A. 11th Cir. Certiorari denied. Reported below: 997 F. 2d 1369.

No. 93–1309. LOUIS DREYFUS CORP. ET AL. *v.* EBANKS ET AL. Sup. Ct. La. Certiorari denied. Reported below: 625 So. 2d 1050.

No. 93–1312. AUTHEMENT, ADMINISTRATRIX OF THE SUCCESSION OF AUTHEMENT, ET AL. *v.* CITGO PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 6 F. 3d 330.

No. 93–1321. FUTUREGRAPHICS, LTD. *v.* EASTMAN KODAK CO.; and FRENCH *v.* EASTMAN KODAK CO. Ct. App. Mich. Certiorari denied.

No. 93–1332. VANOVER ET AL. *v.* LAMPKIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 430.

No. 93–1336. ROGERS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 93–1343. YATER ET AL. *v.* HANCOCK COUNTY PLANNING COMMISSION. Ct. App. Ind. Certiorari denied. Reported below: 614 N. E. 2d 568.

No. 93–1345. MADONIA *v.* BLUE CROSS & BLUE SHIELD OF VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 444.

No. 93–1382. CRAIG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 1101.

No. 93–1396. COSTANZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1537.

No. 93–1417. LIPOVSKY *v.* CARTER, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–1419. DODDS *v.* CIGNA SECURITIES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 12 F. 3d 346.

No. 93–6555. RASHEED-BEY *v.* DEBRUYN, COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 1 F. 3d 1244.

No. 93–6630. MURPHY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 993 F. 2d 871.

No. 93-6655. Hinkle *v.* Collins, Director, Texas Department of Criminal Justice, Institutional Division, et al. C. A. 5th Cir. Certiorari denied.

No. 93-7028. Nelson *v.* Jones. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 3d 438, 619 N. E. 2d 687.

No. 93-7031. Marshall *v.* Lynn, Secretary, Louisiana Department of Corrections, et al. C. A. 5th Cir. Certiorari denied. Reported below: 3 F. 3d 440.

No. 93-7066. Hain *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied. Reported below: 852 P. 2d 744.

No. 93-7148. Kellom *v.* Shelley et al. C. A. 7th Cir. Certiorari denied. Reported below: 2 F. 3d 1153.

No. 93-7228. Edwards *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 3 F. 3d 244.

No. 93-7380. Brown *v.* Two Unknown Marshals. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93-7410. Meuli *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 8 F. 3d 1481.

No. 93-7454. Fouche *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93-7455. Hayes *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 7 F. 3d 144.

No. 93-7477. Vickery *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93-7507. Phillips *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 1 F. 3d 1231.

No. 93-7526. Washington *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 11 F. 3d 1510.

No. 93-7569. Anglero *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1537.

No. 93-7670. Danzey *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 49.

No. 93–7678. LICON-HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 23.

No. 93–7700. CUIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1554.

No. 93–7701. MOLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 995 F. 2d 1020.

No. 93–7710. SANCHEZ *v.* MARTINEZ. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 23.

No. 93–7783. ESTES *v.* VAN DER VEUR, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 405.

No. 93–7813. ADAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 22.

No. 93–7820. WATSON *v.* MORRIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 229.

No. 93–7821. STATON *v.* VAUGHN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–7829. KIBBE *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–7832. PHILLIPS *v.* GANJOO ET AL. Sup. Ct. Va. Certiorari denied.

No. 93–7834. PLATSKY *v.* KILPATRICK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 7 F. 3d 220.

No. 93–7835. MCGUFFEY *v.* GEORGIA ADVOCACY OFFICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 996 F. 2d 1232.

No. 93–7836. MCCAMPBELL *v.* GRIMES. C. A. 11th Cir. Certiorari denied. Reported below: 996 F. 2d 1231.

No. 93–7837. WARREN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7841. HUNT *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 4 F. 3d 985.

No. 93–7843. ROBINSON *v.* STOCK, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 93–7859. VAILUU *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7860. WINKLER *v.* KEANE, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 7 F. 3d 304.

No. 93–7861. WRIGHT *v.* MARSHALL ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1230.

No. 93–7862. TERIO *v.* TERIO. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 190 App. Div. 2d 666, 593 N. Y. S. 2d 467.

No. 93–7864. SUDA *v.* BRENNER ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 195 App. Div. 2d 421, 602 N. Y. S. 2d 524.

No. 93–7866. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7868. BARQUET *v.* MAASS, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1083.

No. 93–7869. BEDFORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 104.

No. 93–7872. LABOY *v.* PUCINSKI. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 112.

No. 93–7875. MCMAHON *v.* BANK OF AMERICA N. T. & S. A. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 25.

No. 93–7877. HAWKINS *v.* CODY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 405.

No. 93–7882. JIMENEZ *v.* MGM. C. A. 6th Cir. Certiorari denied.

No. 93–7884. BAGLEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 93-7886. Askew *v.* Tucker, Governor of Arkansas, et al. C. A. 8th Cir. Certiorari denied. Reported below: 22 F. 3d 307.

No. 93-7887. Moran *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 4 F. 3d 987.

No. 93-7892. Steel *v.* Wachtler et al. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1538.

No. 93-7903. Epps *v.* Coughlin, Commissioner, New York Department of Correctional Services. C. A. 2d Cir. Certiorari denied. Reported below: 13 F. 3d 615.

No. 93-7918. Lewis *v.* Richmond City Police Department et al. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 819.

No. 93-7928. Chilton *v.* Murray, Director, Virginia Department of Corrections, et al. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 222.

No. 93-7940. Nielsen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 1 F. 3d 855.

No. 93-7941. Reyes *v.* Weimer et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93-7952. Murray *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 20.

No. 93-7959. Sotelo Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 202.

No. 93-7961. Stroud *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93-7978. Monish *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93-7996. Tschida *v.* Shalala, Secretary of Health and Human Services. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1553.

No. 93-8002. Stockdale *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 993 F. 2d 886.

No. 93-8018. CALDWELL *v.* KRONER ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8020. CONTRERAS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8022. TRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 207.

No. 93-8043. CAUSEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1341.

No. 93-8071. CASTRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 590.

No. 93-8073. WALL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 408.

No. 93-8077. HOLTHAUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93-8078. HAYS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 397.

No. 93-8080. JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 27.

No. 93-8084. RUBINSTEIN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1071.

No. 93-8086. ANDRUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 207.

No. 93-8087. CABRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93-8088. SLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93-8090. WALDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93-8093. BARNES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 407.

No. 93-8094. HONEYCUTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 785.

No. 93–8099. ERWIN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied.

No. 93–8106. CHESNEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 10 F. 3d 641.

No. 93–8110. FOXWORTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 540.

No. 93–8111. GALEANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 390.

No. 93–8112. GARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 597.

No. 93–8119. DAVIDSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93–8171. MILLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8174. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 346.

No. 93–8176. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93–8178. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1108.

No. 93–785. LANGE *v.* LANGE. Ct. App. Wis. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 175 Wis. 2d 373, 502 N. W. 2d 143.

No. 93–1252. OKLAHOMA *v.* HAIN. Ct. Crim. App. Okla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 852 P. 2d 744.

No. 93–987. MCREADY *v.* BREEDEN, CHAIRMAN, SECURITIES AND EXCHANGE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE GINSBURG took no part in the consideration or decision of this petition. Reported below: 998 F. 2d 7.

No. 93–8039 (A–682). BROWN *v.* UNITED STATES. C. A. 11th Cir. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied. Certiorari denied.

No. 93–1141. MU'MIN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va.;

No. 93–6862. NETHERY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir.;

No. 93–7726. COMER *v.* ARIZONA. Super. Ct. Ariz., Maricopa County; and

No. 93–7780. DAVIS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 93–6862, 993 F. 2d 1154; No. 93–7780, 314 Ark. 257, 863 S. W. 2d 259.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 93–970. DICICCO *v.* TREMBLAY, 510 U. S. 1115; and

No. 93–6820. MOSES *v.* UNITED STATES, 510 U. S. 1121. Petitions for rehearing denied.

APRIL 7, 1994

Dismissal Under Rule 46

No. 93–1231. ORION PICTURES CORP. *v.* SHOWTIME NETWORKS, INC., FKA SHOWTIME/THE MOVIE CHANNEL, INC. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 4 F. 3d 1095.

APRIL 18, 1994

Miscellaneous Orders

No. ———. SIMMS *v.* RUNYON, POSTMASTER GENERAL. Motion to direct the Clerk to file petition for writ of certiorari out of time and not in compliance with the Rules of this Court denied.

No. ———. SMITH *v.* LUCAS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–715 (93–1496). MISSOURI PACIFIC RAILROAD CO., DBA UNION PACIFIC RAILROAD CO. *v.* TINGSTROM. Ct. App. La., 1st

Cir. Application for stay, addressed to JUSTICE THOMAS and referred to the Court, denied.

No. A–769. ANDERSON *v.* HUMANA, INC., ET AL. D. C. Colo. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–1357. IN RE DISBARMENT OF CARPENTER. Disbarment entered. [For earlier order herein, see 510 U. S. 1104.]

No. D–1358. IN RE DISBARMENT OF HENDERSON. Richard Stanley Henderson, of San Diego, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 22, 1994 [510 U. S. 1104], is hereby discharged.

No. D–1361. IN RE DISBARMENT OF KRASNER. Disbarment entered. [For earlier order herein, see 510 U. S. 1105.]

No. D–1363. IN RE DISBARMENT OF ERDHEIM. Disbarment entered. [For earlier order herein, see 510 U. S. 1105.]

No. D–1367. IN RE DISBARMENT OF LONDOFF. Disbarment entered. [For earlier order herein, see 510 U. S. 1106.]

No. D–1368. IN RE DISBARMENT OF SCOTT. Disbarment entered. [For earlier order herein, see 510 U. S. 1106.]

No. D–1370. IN RE DISBARMENT OF MORRIS. Disbarment entered. [For earlier order herein, see 510 U. S. 1106.]

No. D–1381. IN RE DISBARMENT OF MEACHAM. It is ordered that Jerald Samuel Meacham, of Gary, Ind., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1382. IN RE DISBARMENT OF HARROD. It is ordered that Samuel Glenn Harrod III, of Eureka, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1383. IN RE DISBARMENT OF BUDMAN. It is ordered that Ronald Harvey Budman, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1384. IN RE DISBARMENT OF WELLS. It is ordered that William Eugene Wells, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1385. IN RE DISBARMENT OF MCCLENNY. It is ordered that William Madison McClenny, of Louisa, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1386. IN RE DISBARMENT OF HEIMAN. It is ordered that Norman Heiman, of Flushing, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1387. IN RE DISBARMENT OF CHAPMAN. It is ordered that Gerald McNamara Chapman, of Arlington Heights, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 111, Orig. DELAWARE ET AL. *v.* NEW YORK. Motion of the Special Master for award of fees granted, and the Special Master is awarded a total of $47,568.47 to be paid in accordance with the recommendation contained in the fee application dated March 15, 1994. Report of the Special Master with respect to complaints received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 21 days. Replies thereto, if any, may be filed by the parties within 14 days. [For earlier order herein, see, *e. g.*, 510 U. S. 1106.]

No. 92–1920. LIVADAS *v.* AUBRY, CALIFORNIA LABOR COMMISSIONER. C. A. 9th Cir. [Certiorari granted, 510 U. S. 1083.] Motion of Food Employers Council, Inc., for leave to file a brief as *amicus curiae* out of time granted.

No. 93–744. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* GREENWICH COLLIERIES

ET AL.; and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* MAHER TERMINALS, INC., ET AL. C. A. 3d Cir. [Certiorari granted, 510 U. S. 1068.] Motion of respondent Greenwich Collieries for reconsideration of order denying motion for divided argument [510 U. S. 1189] denied. Counsel for respondent Greenwich Collieries is designated to present oral argument on behalf of respondents.

No. 93–7034. IN RE ANDERSON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [510 U. S. 1108] denied.

No. 93–8297. IN RE WASHINGTON. Petition for writ of habeas corpus denied.

No. 93–7999. IN RE SANDERS. Petition for writ of mandamus denied.

Certiorari Granted

No. 92–2038. ASGROW SEED CO. *v.* WINTERBOER ET AL., DBA DEEBEES. C. A. Fed. Cir. Certiorari granted. Reported below: 982 F. 2d 486.

No. 93–1170. UNITED STATES ET AL. *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 990 F. 2d 1271.

No. 93–1318. INTERSTATE COMMERCE COMMISSION *v.* TRANSCON LINES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 9 F. 3d 64.

No. 93–1340. UNITED STATES *v.* MEZZANATTO. C. A. 9th Cir. Certiorari granted. Reported below: 998 F. 2d 1452.

No. 93–1260. UNITED STATES *v.* LOPEZ. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 2 F. 3d 1342.

Certiorari Denied

No. 93–959. GERGICK *v.* JOHNSON, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 997 F. 2d 1237.

No. 93–967. ZAPATA GULF MARINE CORP. *v.* CHIASSON. C. A. 5th Cir. Certiorari denied. Reported below: 988 F. 2d 513.

No. 93–968. IVERSON *v.* WEEKS ET AL. Ct. App. Ore. Certiorari denied. Reported below: 121 Ore. App. 206, 856 P. 2d 344.

No. 93–972. FIGUEROA ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 7 F. 3d 1405.

No. 93–978. KOFF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 3 F. 3d 1297.

No. 93–982. VIERRETHER *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 6 F. 3d 786.

No. 93–996. IN RE HOLLOWAY. C. A. D. C. Cir. Certiorari denied. Reported below: 995 F. 2d 1080.

No. 93–1013. CITY OF LOS ANGELES *v.* TOPANGA PRESS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 989 F. 2d 1524.

No. 93–1023. BARTH *v.* DUFFY, DIRECTOR, UNITED STATES INFORMATION AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 2 F. 3d 1180.

No. 93–1054. CONFECCIONES ZUNY LTDA. ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 6 F. 3d 37.

No. 93–1057. CLEWIS ET AL. *v.* KRIVANEK, HILLSBOROUGH COUNTY SUPERVISOR OF ELECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 625 So. 2d 840.

No. 93–1127. WHITE MOUNTAIN APACHE TRIBE OF ARIZONA *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 5 F. 3d 1506.

No. 93–1145. FILIOS ET AL. *v.* MASSACHUSETTS COMMISSIONER OF REVENUE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 415 Mass. 806, 615 N. E. 2d 933.

No. 93–1156. HALEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE ET AL. (two cases). C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 536.

No. 93–1163. HOUSE OF RAEFORD FARMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 223.

No. 93–1171. Moerman *v.* California et al. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 17 Cal. App. 4th 452, 21 Cal. Rptr. 2d 329.

No. 93–1224. Todd Shipyards Corp. et al. *v.* Edwards et al. C. A. 9th Cir. Certiorari denied. Reported below: 999 F. 2d 1374.

No. 93–1229. Robinson et al. *v.* Federal Deposit Insurance Corporation, as Receiver for Chas. Schreiner Bank. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 528.

No. 93–1248. Winters, dba Sharp's Pawn Shop *v.* Board of County Commissioners of Osage County, Oklahoma, et al.; and

No. 93–1366. Landsdown, Individually and as Deputy Sheriff, et al. *v.* Winters. C. A. 10th Cir. Certiorari denied. Reported below: 4 F. 3d 848.

No. 93–1284. Hoechst Celanese Corp. et al. *v.* Gillis et al. C. A. 3d Cir. Certiorari denied. Reported below: 4 F. 3d 1137.

No. 93–1314. Tauber *v.* Salomon Forex, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 966.

No. 93–1317. Sanderson *v.* Winfield Carraway Hospital et al. Sup. Ct. Ala. Certiorari denied. Reported below: 639 So. 2d 962.

No. 93–1319. Mendenhall et al. *v.* Cedarapids, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 5 F. 3d 1557.

No. 93–1320. Amerman *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 49.

No. 93–1323. DeNooyer, by Next Friend DeNooyer, et al. *v.* Livonia Public Schools et al. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 211.

No. 93–1326. Andriola et al. *v.* Antinoro et al. Ct. App. N. Y. Certiorari denied. Reported below: 82 N. Y. 2d 320, 624 N. E. 2d 667.

No. 93–1330. Uberoi *v.* University of Colorado Board of Regents et al. Ct. App. Colo. Certiorari denied.

No. 93–1331. QUINN-L CAPITAL CORP. ET AL. *v.* ROYAL INSURANCE COMPANY OF AMERICA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 3 F. 3d 877.

No. 93–1333. SHIMIZU *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA (BELLAH, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–1334. MCCUMMINGS *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 14 F. 3d 613.

No. 93–1337. MARTE ET AL. *v.* CHEVRON CORPORATION LONG-TERM DISABILITY PLAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1107.

No. 93–1339. VENTETOULO, ACTING DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* DEWITT. C. A. 1st Cir. Certiorari denied. Reported below: 6 F. 3d 32.

No. 93–1344. FITZGERALD *v.* MONTANA DEPARTMENT OF FAMILY SERVICES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 26.

No. 93–1346. WISEMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 991 F. 2d 804.

No. 93–1347. BERG *v.* DENTISTS INSURANCE CO. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–1349. RAMSEY, SECRETARY, DEPARTMENT OF HEALTH AND HOSPITALS OF LOUISIANA, ET AL. *v.* ABBEVILLE GENERAL HOSPITAL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 3 F. 3d 797.

No. 93–1351. BROWN *v.* BROWN. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 243 Ill. App. 3d 1104, 657 N. E. 2d 392.

No. 93–1356. ULYAS ET AL. *v.* COSTA ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 425 Pa. Super. 634, 619 A. 2d 793.

No. 93–1359. RAJU *v.* RHODES. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 1210.

No. 93–1360. Fuentes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 1004.

No. 93–1368. Northrop Corp. *v.* United States ex rel. Barajas. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 407.

No. 93–1369. Tarkanian et al. *v.* National Collegiate Athletic Assn. C. A. 9th Cir. Certiorari denied. Reported below: 10 F. 3d 633.

No. 93–1370. Wu *v.* Board of Trustees, University of Alabama, et al. C. A. 11th Cir. Certiorari denied. Reported below: 996 F. 2d 271.

No. 93–1375. Goldstein *v.* United States et al. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1074.

No. 93–1386. Richardson *v.* Shalala, Secretary of Health and Human Services, et al. C. A. 3d Cir. Certiorari denied. Reported below: 993 F. 2d 878.

No. 93–1409. Nationalist Movement *v.* Forsyth County, Georgia. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 168.

No. 93–1413. Constant *v.* Wilson et al. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1105.

No. 93–1425. Rhinehart et al. *v.* Seattle Times et al. Ct. App. Wash. Certiorari denied.

No. 93–1426. DeRewal *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 10 F. 3d 100.

No. 93–1427. DiFranco *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 390.

No. 93–1439. Hoskins, Individually, and in His Official Capacity as Commissioner of the Philadelphia Streets Department *v.* Kinney et al. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 1067.

No. 93–1442. Bradford *v.* Bradford. Ct. Civ. App. Ala. Certiorari denied. Reported below: 628 So. 2d 732.

No. 93–1445. LANDESBERG *v.* UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 590.

No. 93–1447. KUEHL ET UX. *v.* FEDERAL DEPOSIT INSURANCE CORPORATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 8 F. 3d 905.

No. 93–1451. BROWN ET VIR *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 821.

No. 93–1467. DUNCAN *v.* STRANGE. C. A. 11th Cir. Certiorari denied.

No. 93–1474. MCDONALD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93–1476. CHRISTIANSEN *v.* SMITH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–1511. BRAWNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 597.

No. 93–5455. SIMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 990 F. 2d 804.

No. 93–6636. QUARLES *v.* SCUDERI ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–6659. SLOAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 996 F. 2d 1213.

No. 93–6784. WARREN *v.* UNITED STATES;
No. 93–7495. WARREN *v.* UNITED STATES;
No. 93–7500. PEACOCK *v.* UNITED STATES; and
No. 93–7536. JENKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 4 F. 3d 1338.

No. 93–7025. NAPOLES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 993 F. 2d 1170.

No. 93–7084. TUCKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 2 F. 3d 574.

No. 93–7095. POWERS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1500.

No. 93–7117. GREATHOUSE *v.* UNITED STATES;
No. 93–7120. WILLIAMS *v.* UNITED STATES;
No. 93–7145. GREATHOUSE *v.* UNITED STATES; and
No. 93–7146. GREATHOUSE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 4 F. 3d 1000.

No. 93–7174. DUNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 4 F. 3d 995.

No. 93–7175. KONG YIN CHU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 1244.

No. 93–7264. HOSKINS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 93–7292. GHOLSTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1499.

No. 93–7362. MCCOMBS *v.* NORRIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 1 F. 3d 1233.

No. 93–7381. ABANATHA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 999 F. 2d 1246.

No. 93–7403. BUSBY *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 93–7412. LEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 6 F. 3d 1297.

No. 93–7421. BAKER *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 106.

No. 93–7459. GROOMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 2 F. 3d 85.

No. 93–7479. SHOCKEY *v.* BADGER COAL CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 998 F. 2d 1010.

No. 93–7503. TORRES RIVERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 4 F. 3d 1026.

No. 93–7549. CASIO *v.* CALIFORNIA; and
No. 93–8010. KING *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7554. NEVELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1555.

No. 93–7555. MYRICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 234.

No. 93–7564. HORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 6 F. 3d 276.

No. 93–7565. FALIN *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 6 F. 3d 207.

No. 93–7579. CAMPBELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93–7586. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 227.

No. 93–7609. JOHNSTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 976 F. 2d 738.

No. 93–7628. MCKINLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 995 F. 2d 1020.

No. 93–7653. MENDOZA-LOPEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 7 F. 3d 1483.

No. 93–7671. FIRE THUNDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 22 F. 3d 306.

No. 93–7706. PIERATT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 1 F. 3d 330.

No. 93–7711. VAUGHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 7 F. 3d 1533.

No. 93–7785. COBB *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 20.

No. 93–7823. YITREF *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–7824. TITLEMORE *v.* RAYMOND ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 1541.

No. 93-7846. THIEKEN *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1074.

No. 93-7879. GROSS *v.* WESTERN-SOUTHERN LIFE INSURANCE CO. ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied. Reported below: 85 Ohio App. 3d 662, 621 N. E. 2d 412.

No. 93-7891. MCMURTRY *v.* SNYDER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 93-7900. ISTVAN *v.* WILLOUGHBY OF CHEVY CHASE CONDOMINIUM COUNCIL OF UNIT OWNERS, INC. Cir. Ct. Montgomery County, Md. Certiorari denied.

No. 93-7902. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93-7904. JOHNSON *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1425.

No. 93-7905. JOHNSON *v.* SENKOWSKI, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1425.

No. 93-7906. JOHNSON *v.* STINSON, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1425.

No. 93-7907. STEPHENS *v.* O'DEA, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 109.

No. 93-7914. MARTINEZ-PEREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 118.

No. 93-7917. OLLIE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 93-7919. LENSING *v.* ARKANSAS DEPARTMENT OF HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 1042.

No. 93-7920. MAZYCK *v.* SMITH, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 225.

No. 93–7922. NORTHINGTON *v.* HOFFMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 93–7924. MURRAY *v.* DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied.

No. 93–7925. LEWIS *v.* MOYER. C. A. 6th Cir. Certiorari denied.

No. 93–7929. DELEMOS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 107.

No. 93–7933. DOBER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7938. THOMPSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 1377.

No. 93–7942. DANILOV *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 155 Pa. Commw. 678, 625 A. 2d 773.

No. 93–7946. DYER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7948. KENNEDY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 93–7949. KENNEDY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 244 Neb. xxii.

No. 93–7962. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 253 Ill. App. 3d 165, 624 N. E. 2d 1378.

No. 93–7964. THOMPSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7966. WALLACE *v.* TAYLOR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1545.

No. 93–7971. DOUGLAS *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–7973. WEBER *v.* GORENFELD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 34.

No. 93–7974. Rong Hua Chen *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 2 F. 3d 330.

No. 93–7984. Von Schiget *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7985. Taylor *v.* Strickland et al. C. A. 4th Cir. Certiorari denied. Reported below: 4 F. 3d 986.

No. 93–7989. Gillis *v.* Maryland. Ct. App. Md. Certiorari denied. Reported below: 333 Md. 69, 633 A. 2d 888.

No. 93–7990. Hilaire *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–7992. Joseph *v.* Whitley, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1097.

No. 93–7994. Harris *v.* Rocha, Warden. Sup. Ct. Cal. Certiorari denied.

No. 93–7995. Edwards *v.* Phoebe Putney Memorial Hospital et al. C. A. 11th Cir. Certiorari denied. Reported below: 977 F. 2d 599.

No. 93–7997. Sullivan *v.* Clark, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 4 F. 3d 997.

No. 93–8001. Shakur *v.* Beyer, Superintendent, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 93–8011. Hunter *v.* Dressler et al. C. A. 6th Cir. Certiorari denied.

No. 93–8012. Hughes *v.* White, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1551.

No. 93–8013. Gomez *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8014. Good *v.* Bowles, Sheriff, Dallas County, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1547.

No. 93–8030. Ledden *v.* Stepanik et al. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 404.

No. 93-8034. SELLERS *v.* PETERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 93-8041. CONTRERAS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 191 App. Div. 2d 235, 594 N. Y. S. 2d 254.

No. 93-8045. BARTLETT *v.* VANCE. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1428.

No. 93-8047. CLIFTON *v.* VAUGHN, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8055. RANDALL *v.* FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 93-8062. DUFFEY ET AL. *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 93-8063. ROSE ET AL. *v.* MERRELL DOW PHARMACEUTICALS ET AL. C. A. 9th Cir. Certiorari denied.

No. 93-8081. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 822.

No. 93-8082. MARROQUIN-GIRON *v.* UNITED STATES; and
No. 93-8120. PAGLIARA-SAMAYOA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93-8095. HENSON *v.* SNYDER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8098. CARTER *v.* VAUGHN, SUPERINTENDENT, PENNSYLVANIA STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8103. PITTS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93-8113. ARNETT *v.* KELLOGG CO. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 211.

No. 93-8122. STEELE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8123. Limones *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 1004.

No. 93–8124. Nunez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 542.

No. 93–8129. Pinkett *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 206.

No. 93–8130. Rivera *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 346.

No. 93–8137. Angulo-Lopez *v.* United States; and Barber *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 7 F. 3d 1506 (first case); 9 F. 3d 118 (second case).

No. 93–8140. Tantalo *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 93–8143. Hutchinson *v.* Artuz, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 93–8144. Serhan *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8145. Woodward *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 408.

No. 93–8146. Vincent *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 13 F. 3d 409.

No. 93–8149. Castaneda *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 30 and 9 F. 3d 761.

No. 93–8158. DeWitt *v.* United States. Ct. App. D. C. Certiorari denied.

No. 93–8160. Bucksa *v.* Federal Bureau of Investigation. C. A. 8th Cir. Certiorari denied.

No. 93–8162. Grant *v.* Vaughn, Superintendent, Pennsylvania State Correctional Institution at Graterford, et al. C. A. 3d Cir. Certiorari denied.

No. 93–8163. Jolivet *v.* Immigration and Naturalization Service. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1552.

No. 93–8167. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 597.

No. 93–8169. MCCASKEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 368.

No. 93–8172. ROSA *v.* UNITED STATES; and
No. 93–8197. HERNANDEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 315.

No. 93–8173. LYSNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93–8177. BACKSTROM *v.* IOWA DISTRICT COURT FOR JONES COUNTY; and LEEPS *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 508 N. W. 2d 705 (first case); 512 N. W. 2d 578 (second case).

No. 93–8181. ROSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93–8182. NAVANICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 407.

No. 93–8186. O'MURCHU *v.* SUTER. C. A. D. C. Cir. Certiorari denied.

No. 93–8192. JAMES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 227.

No. 93–8193. GIBBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–8196. HAGHIGHAT-JOU *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

No. 93–8198. INNIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 7 F. 3d 840.

No. 93–8202. TERRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1097.

No. 93–8203. VAN SICKLE *v.* MCGINNIS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 93–8204. HUTCHINSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 118.

No. 93–8206. Flowers *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 602.

No. 93–8211. Lopez *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8218. Ovalle *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 604.

No. 93–8221. Brown *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 1374.

No. 93–8230. Bacon *v.* Department of the Air Force. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 232.

No. 93–8232. Pearson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1093.

No. 93–8235. Madera-Avila *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1109.

No. 93–8236. Oakes *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 11 F. 3d 897.

No. 93–8237. Little *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 10 F. 3d 1197.

No. 93–8238. Pirtle *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8239. Makinde *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 108.

No. 93–8240. Rodrick *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 591.

No. 93–8241. Thomas *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 11 F. 3d 620.

No. 93–8242. Desfonds *v.* Massachusetts. C. A. 1st Cir. Certiorari denied. Reported below: 9 F. 3d 1535.

No. 93–8243. White *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8244. Carpenter *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 11 F. 3d 788.

No. 93–8245. HICKLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1109.

No. 93–8250. URIAS-MELENDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8253. VILLA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93–8254. SINKFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1500.

No. 93–8273. FALCONER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 31.

No. 93–8279. CARRIER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 867.

No. 93–8283. DRURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 209.

No. 93–8284. DUPREE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 11 F. 3d 620.

No. 93–8285. CAMPOS-ROZO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 397.

No. 93–8287. STANLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 12 F. 3d 17.

No. 93–8289. TRAUNIG *v.* DEPARTMENT OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1074.

No. 93–8290. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8292. VELTMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 718.

No. 93–8296. TAYLOR *v.* JOHNSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 93–8300. WISE *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 414.

No. 93–8306. OWENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 167.

No. 93–8307. Myers *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8314. Mayles *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1431.

No. 93–8330. Zapata *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 219.

No. 93–8334. Ballantine *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 8 F. 3d 71.

No. 93–8336. Turner *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 1 F. 3d 1243.

No. 93–8337. Ponce *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 999 F. 2d 1579.

No. 93–8345. Carter *v.* Rone, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 211.

No. 93–8353. Tornowski *v.* Hart. C. A. 10th Cir. Certiorari denied. Reported below: 10 F. 3d 810.

No. 93–8357. Hunter *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–8359. Montalvo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1099.

No. 93–8365. Radziercz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 7 F. 3d 1193.

No. 93–8366. Burgenmeyer *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 93–8368. Asrar *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 93–8378. Ciprano *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–8380. Sweatt *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93–8387. Dahlman *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 1391.

No. 93–8397. PARIS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 3d 1495, 621 N. E. 2d 1210.

No. 93–1187. TORWICO ELECTRONICS, INC. *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ENERGY. C. A. 3d Cir. Motion of Kathryn R. Heidt for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 8 F. 3d 146.

No. 93–1276. UNITED STATES *v.* LEE. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 935 F. 2d 952.

No. 93–6134. GAY *v.* CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to amend petition for writ of certiorari granted. Certiorari denied. Reported below: 4 Cal. 4th 1233, 850 P. 2d 1.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentence in this case.

No. 93–6408. GOSCH *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–6937. CUMMINGS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 93–7441. JEFFERSON *v.* ZANT, WARDEN. Sup. Ct. Ga.;
No. 93–7620. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex.;
No. 93–7635. VAN TRAN *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 93–7681. MCHONE *v.* NORTH CAROLINA. Sup. Ct. N. C.;
No. 93–7759. SCHACKART *v.* ARIZONA. Sup. Ct. Ariz.;
No. 93–7958. BIBLE *v.* ARIZONA. Sup. Ct. Ariz.;
No. 93–7983. VILLEGAS LOPEZ *v.* ARIZONA. Sup. Ct. Ariz.;
No. 93–7986. ATWATER *v.* FLORIDA. Sup. Ct. Fla.;
No. 93–8009. CADE *v.* ALABAMA. Ct. Crim. App. Ala.; and
No. 93–8231. JOHNSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 93–6937, 4 Cal. 4th 1233, 850 P. 2d 1; No. 93–7441, 263 Ga. 316, 431 S. E. 2d 110; No. 93–7635, 864 S. W. 2d 465; No. 93–7681, 334 N. C. 627, 435 S. E. 2d 296; No. 93–7759, 175 Ariz. 494, 858 P. 2d 639; No. 93–7958, 175 Ariz. 549, 858 P. 2d 1152; No. 93–7983, 175 Ariz. 407, 857 P. 2d 1261; No. 93–7986, 626 So. 2d 1325; No. 93–8009, 629 So. 2d 38; No. 93–8231, 871 S. W. 2d 183.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93–6893. HOLLY *v.* BRENNAN, WARDEN, ET AL. C. A. 3d Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

Rehearing Denied

No. 92–6281. HAGEN *v.* UTAH, 510 U. S. 399;
No. 93–610. McDONALD *v.* UNITED STATES, 510 U. S. 994;
No. 93–713. GRAHAM *v.* FLORIDA SUPREME COURT ET AL., 510 U. S. 1163;
No. 93–796. WHITE *v.* UNITED STATES, 510 U. S. 1111;
No. 93–907. SHELLING *v.* SOUTHERN RAILWAY CO., 510 U. S. 1113;
No. 93–957. RAMASWAMI *v.* TEXAS DEPARTMENT OF HUMAN SERVICES ET AL., 510 U. S. 1114;
No. 93–1027. HORNING *v.* OHIO, 510 U. S. 1117;
No. 93–6573. JAMES, AKA FAUST *v.* UNITED STATES, 510 U. S. 1120;
No. 93–6753. BENSON *v.* HARGETT, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, 510 U. S. 1058;
No. 93–6823. PRYOR *v.* UNITED STATES, 510 U. S. 1166;
No. 93–6946. LIGHTLE ET UX. *v.* FARMERS STATE BANK, 510 U. S. 1122;
No. 93–7001. KLUTNICK *v.* GIGANTI, 510 U. S. 1122;
No. 93–7076. GRADY *v.* MIAMI HERALD PUBLISHING CO. ET AL., 510 U. S. 1124;
No. 93–7080. ANOLIK *v.* SUNRISE BANK OF CALIFORNIA ET AL., 510 U. S. 1125;
No. 93–7158. CARROLL *v.* ALABAMA, 510 U. S. 1171;
No. 93–7185. ROBINSON *v.* WELBORN ET AL., 510 U. S. 1127;
No. 93–7207. GUERRERO *v.* DAVIDSON, SHERIFF, DESCHUTES COUNTY, 510 U. S. 1128;
No. 93–7225. GAMBLE *v.* EAU CLAIRE COUNTY, WISCONSIN, ET AL., 510 U. S. 1129;
No. 93–7270. WARREN *v.* UNITED STATES, 510 U. S. 1167;
No. 93–7294. IGE *v.* UNITED STATES, 510 U. S. 1132;

No. 93–7297. DELPH *v.* INTERNATIONAL PAPER ET AL., 510 U. S. 1132;

No. 93–7314. KARIM-PANAHI *v.* CALIFORNIA DEPARTMENT OF TRANSPORTATION ET AL., 510 U. S. 1133;

No. 93–7350. BORROMEO *v.* UNITED STATES, 510 U. S. 1134;

No. 93–7418. WEHRINGER *v.* BRANNIGAN, 510 U. S. 1168;

No. 93–7422. SIMPSON *v.* ROBINSON, SUPERINTENDENT, CHATHAM CORRECTIONAL UNIT, 510 U. S. 1180;

No. 93–7431. IN RE O'CONNOR, 510 U. S. 1108;

No. 93–7461. IN RE ERWIN, 510 U. S. 1175;

No. 93–7483. RANDALL *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 510 U. S. 1181;

No. 93–7489. RICHARDSON ET AL. *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL., 510 U. S. 1138;

No. 93–7541. VITEK *v.* ST. PAUL PROPERTY & CASUALTY, 510 U. S. 1181;

No. 93–7553. LYLE *v.* RICHARDSON, 510 U. S. 1139;

No. 93–7651. NHAN KIEM TRAN *v.* UNITED STATES, 510 U. S. 1170; and

No. 93–7663. OKOLIE *v.* UNITED STATES, 510 U. S. 1170. Petitions for rehearing denied.

No. 93–659. MILLER *v.* LA ROSA ET AL., 510 U. S. 1109. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 93–936. NORTH STAR STEEL CO., INC. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, 510 U. S. 1114. Petition for rehearing denied. JUSTICE BLACKMUN would call for a response to the petition for rehearing.

APRIL 19, 1994

Dismissal Under Rule 46

No. 93–7899. KUYKENDALL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.

APRIL 21, 1994

Certiorari Dismissed

No. 93–8776 (A–874). STEWART *v.* CHILES, GOVERNOR OF FLORIDA, ET AL. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari dismissed for want of jurisdiction.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

Certiorari Denied

No. 93–8761 (A–869). STEWART *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 632 So. 2d 59.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93–8775 (A–873). STEWART *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 636 So. 2d 16.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93–8816 (A–876). STEWART *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93-8819 (A-877). STEWART *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

APRIL 22, 1994

Dismissal Under Rule 46

No. 93-1016. SNEAD ET AL. *v.* REDLAND AGGREGATES LTD. ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 998 F. 2d 1325.

APRIL 25, 1994

Dismissal Under Rule 46

No. 93-8555. CRAMER *v.* LECUREUX, WARDEN. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46.1.

Certiorari Granted—Vacated and Remanded

No. 93-764. MIDWEST MARINE CONTRACTOR, INC. *v.* RUFOLO ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McDermott, Inc.* v. *AmClyde, ante,* p. 202, and *Boca Grande Club, Inc.* v. *Florida Power & Light Co., ante,* p. 222. Reported below: 6 F. 3d 448.

No. 93-7599. WELLS *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted.

Certiorari granted limited to Question 3 presented by the petition, judgment vacated, and case remanded for further consideration in light of the position presently asserted by the Solicitor General in his brief for the United States filed March 30, 1994. Reported below: 4 F. 3d 999.

Miscellaneous Orders

No. ———. Scott *v.* Ohio. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. D–1369. In re Disbarment of Woodard. Disbarment entered. [For earlier order herein, see 510 U. S. 1106.]

No. D–1388. In re Disbarment of Klein. It is ordered that Lee J. Klein, of Lansing, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93–8531. In re Rentschler. Petition for writ of habeas corpus denied.

No. 93–1364. In re Scroggy, Warden, et al. Petition for writ of mandamus denied.

Certiorari Granted

No. 93–7927. Kyles *v.* Whitley, Warden. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 5 F. 3d 806.

Certiorari Denied

No. 93–154. Heritage Capital Corp. et al. *v.* Deloitte, Haskins & Sells. C. A. 4th Cir. Certiorari denied. Reported below: 993 F. 2d 228.

No. 93–1015. Cardwell *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 6 F. 3d 778.

No. 93–1024. Amerada Hess Corp. et al. *v.* Owens-Corning Fiberglas Corp. Sup. Ct. Ala. Certiorari denied. Reported below: 627 So. 2d 367.

No. 93–1030. MANSFIELD *v.* UNITED STATES. Ct. Mil. App. Certiorari denied. Reported below: 38 M. J. 415.

No. 93–1047. BRANTON *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 993 F. 2d 906.

No. 93–1246. CASCADE GENERAL, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 731.

No. 93–1315. PECK, TRUSTEE FOR THE ROBERT M. PECK, M. D., INC., DEFINED BENEFIT PENSION TRUST, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1550.

No. 93–1367. IN RE SHIEH. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 17 Cal. App. 4th 1154, 21 Cal. Rptr. 2d 886.

No. 93–1371. GEPFRICH *v.* GEPFRICH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 36.

No. 93–1374. SANDERS *v.* CITY OF KANSAS CITY, KANSAS, ET AL. Ct. App. Kan. Certiorari denied. Reported below: 18 Kan. App. 2d 688, 858 P. 2d 833.

No. 93–1376. FLORIDA *v.* POUGH ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 630 So. 2d 184.

No. 93–1378. NAPLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 2 F. 3d 1159.

No. 93–1381. RYNDAK *v.* RIVER GROVE POLICE PENSION BOARD. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 248 Ill. App. 3d 486, 618 N. E. 2d 606.

No. 93–1387. GIBSON *v.* MACOMBER. Ct. App. Ga. Certiorari denied.

No. 93–1388. LAMBERT ET AL. *v.* GENESEE HOSPITAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 10 F. 3d 46.

No. 93–1390. SPAIN ET AL. *v.* AETNA LIFE INSURANCE CO. C. A. 9th Cir. Certiorari denied. Reported below: 11 F. 3d 129.

No. 93-1398. STAUFFACHER *v.* TELEDYNE CONTINENTAL MOTORS. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1549.

No. 93-1399. ENCORE SYSTEMS, INC., ET AL. *v.* LADNEY. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1072.

No. 93-1404. MARTIN *v.* FLORIDA POWER CORP. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 507.

No. 93-1429. CONYERS COMMUNITY CHURCH, INC., ET AL. *v.* STEVENS ET AL. Ct. App. Ga. Certiorari denied. Reported below: 210 Ga. App. 231, 435 S. E. 2d 690.

No. 93-1430. LEWIS *v.* CADLE CO. II, INC. Sup. Ct. Kan. Certiorari denied. Reported below: 254 Kan. 158, 864 P. 2d 718.

No. 93-1432. ADAMO ET AL. *v.* STATE FARM LLOYDS CO. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 853 S. W. 2d 673.

No. 93-1448. MILOSLAVSKY ET AL. *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1426.

No. 93-1464. STROBRIDGE *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 591.

No. 93-1472. SIEGEL *v.* JAMES ISLAND PUBLIC SERVICE DISTRICT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1544.

No. 93-1503. GOAD *v.* WILLIAMS. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93-1531. POLYAK *v.* HAMILTON, JUDGE; POLYAK *v.* BUFORD EVANS & SONS; POLYAK *v.* BOSTON ET AL.; POLYAK *v.* HULEN ET AL.; POLYAK *v.* HULEN; and POLYAK *v.* STACK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 4 F. 3d 994 (first, third, and sixth cases); 2 F. 3d 1151 (second, fourth, and fifth cases).

No. 93-1534. FISCHL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 107.

No. 93-6952. WATERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 10 F. 3d 807.

No. 93–7201. McGlocklin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 8 F. 3d 1037.

No. 93–7329. Wilson *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 2 F. 3d 226.

No. 93–7647. Daniels et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 986 F. 2d 451 and 5 F. 3d 495.

No. 93–7704. McKenzie *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 120.

No. 93–7720. Moore *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 996 F. 2d 1229.

No. 93–7744. Hill *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 102.

No. 93–7883. Adepegba *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 93–7916. Morgan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1546.

No. 93–7998. Van Wagner *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1545.

No. 93–8007. Ramsey *v.* Crosby et al. Sup. Ct. Colo. Certiorari denied.

No. 93–8023. Hale *v.* Via et al. C. A. 8th Cir. Certiorari denied. Reported below: 22 F. 3d 308.

No. 93–8025. Ortega *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8031. L. A. E. *v.* Davis et al. Sup. Ct. Ga. Certiorari denied. Reported below: 263 Ga. 473, 435 S. E. 2d 216.

No. 93–8032. Streeter *v.* Burton. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 218.

No. 93–8037. Hunnewell *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 10 F. 3d 805.

No. 93–8038. CLAY *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 222.

No. 93–8044. TOEGEMANN *v.* RICH ET AL. Sup. Ct. R. I. Certiorari denied.

No. 93–8046. DINGLE *v.* CRAWFORD ET AL. Sup. Ct. S. C. Certiorari denied.

No. 93–8048. WILLIAMS *v.* HAWLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 93–8051. WHITEHEAD *v.* BRADLEY UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 1101.

No. 93–8054. MANNS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 618 N. E. 2d 62.

No. 93–8057. BRINSON *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 93–8059. SAVICH *v.* SAVICH. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 623 So. 2d 503.

No. 93–8060. BROWN *v.* CITY OF BOISE ET AL. Sup. Ct. Idaho. Certiorari denied.

No. 93–8065. ESTRADA *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 93–8066. WITCHER *v.* WITCHER. Super. Ct. Pa. Certiorari denied. Reported below: 431 Pa. Super. 656, 631 A. 2d 1383.

No. 93–8067. ARNEY *v.* ROBERTS, DEPUTY SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 9 F. 3d 116.

No. 93–8069. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8072. SHELTON *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1108.

No. 93–8074. CALVENTO *v.* GARZA, JURE & KING ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8075. STILLWELL *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 124 Idaho 366, 859 P. 2d 964.

No. 93–8079. HANZY *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8083. NARD *v.* REED, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 994 F. 2d 843.

No. 93–8085. MABERY *v.* MANN, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 93–8091. BAKER *v.* LOPATIN, MILLER, FREEDMAN, BLUESTONE, ERLICH, ROSEN & BARTNICK, ATTORNEYS AT LAW, P. C. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 106.

No. 93–8092. BAXTER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8097. DICK *v.* PETERS, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 93–8104. WASHINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8107. SHACKFORD *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 820.

No. 93–8108. YARRELL *v.* NUNNELEE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 823.

No. 93–8116. CASTILLO *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8117. TENNER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 6 Cal. 4th 559, 862 P. 2d 840.

No. 93–8121. GHEITH *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 632 So. 2d 1037.

No. 93–8125. MURILLO *v.* TANSY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 406.

No. 93–8138. WILSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 10 F. 3d 734.

No. 93–8155. WOLFE *v.* MEYERS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8157. CORNELLIER *v.* AVENENTI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 996 F. 2d 1224.

No. 93–8159. BROWN-BRUNSON ET VIR *v.* HUNTER, SUPERINTENDENT, BALTIMORE COUNTY BOARD OF EDUCATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 816.

No. 93–8179. COSCIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1538.

No. 93–8209. MORGAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 10 F. 3d 810.

No. 93–8217. ZINK *v.* TURNER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 93–8252. WILLIAMS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–8274. SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 209.

No. 93–8277. WOOLERY *v.* SPAULDING, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 1325.

No. 93–8282. ANDERSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 15 F. 3d 979.

No. 93–8305. ROSCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1226.

No. 93–8311. ANDERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 998 F. 2d 1022.

No. 93–8369. ALSTON *v.* SWISHER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 816.

No. 93–8389. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8390. ALTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–8391. Boyd *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 602.

No. 93–8393. Ramsden *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 2 F. 3d 322.

No. 93–8396. Marshall *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 15 F. 3d 1160.

No. 93–8402. Treadwell *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 1442.

No. 93–8407. Lanham *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 219.

No. 93–8408. Rico-Ruiz *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 218.

No. 93–8409. Patton *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1498.

No. 93–8410. Lane *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–8411. Mulhollan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–8412. Porter *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93–8414. McGeough *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–8415. Ortiz *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1093.

No. 93–8417. Cruz-Moreno *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1091.

No. 93–8432. Arias *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 14 F. 3d 45.

No. 93–8437. Duarte Otero *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 543.

No. 93–8441. Bieregu *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–8444. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–8448. SIMMONS *v.* MURRAY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 206.

No. 93–8449. ELZAATARI, AKA MCCONNELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 218.

No. 93–8451. FERRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 602.

No. 93–8452. FITZHERBERT *v.* UNITED STATES; and
No. 93–8453. FITZHERBERT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 340.

No. 93–8456. DIAZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1091.

No. 93–8457. ACOSTA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93–8459. FURMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1099.

No. 93–8469. AHAMEFULE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–8475. TURNBULL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8476. WHITEHEAD ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8488. KENNEDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 597.

No. 93–8489. KIDD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 30.

No. 93–8493. KRAMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 130.

No. 93–8498. HERRING *v.* MEACHUM, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 374.

No. 93–8499. GALBRAITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93–8500. KERR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 13 F. 3d 203.

No. 93–8508. NEYENS *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 526 N. W. 2d 578.

No. 93–8514. PAGE-BEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 22 F. 3d 308.

No. 93–8520. BARNETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1537.

No. 93–8523. TARVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 53.

No. 93–8544. SANTIAGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1432.

No. 93–8545. SANTIAGO-GODINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 722.

No. 93–8546. SANCHEZ TELLEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 530.

No. 93–8552. REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93–8554. LODGE *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 93–1012. NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION *v.* ORNDORFF. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 998 F. 2d 1426.

No. 93–1380. ARAVE, WARDEN *v.* BEAM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 3 F. 3d 1301.

No. 93–1044. HOFFMAN *v.* HARRIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 233.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Petitioner Ian Hoffman brought suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, against respondents, Kentucky's Cabinet for Human Resources (CHR), two CHR social workers, and his former wife, Melisa Hoffman, alleging that they had deprived him of a constitutionally protected liberty interest in being allowed to visit his minor daughter, B. H. The events giving rise to the suit began when Melisa told the social workers that she suspected petitioner of sexually abusing B. H. The social workers obtained an *ex parte* order from a state court that suspended petitioner's visitation rights. The District Court held that the social workers were absolutely immune from damages liability under § 1983 for this conduct. Relying on its decision in *Salyer* v. *Patrick*, 874 F. 2d 374 (CA6 1989), the Court of Appeals affirmed. I would grant certiorari to address petitioner's challenge to that ruling.

In *Salyer*, the Sixth Circuit held that, "due to their quasi-prosecutorial function in the initiation of child abuse proceedings," social workers are absolutely immune from liability for filing juvenile abuse petitions. *Id.*, at 378. Other courts addressing the question have agreed that social workers are entitled to absolute immunity under § 1983 in some instances, depending on their conduct and the terms of the state laws pursuant to which they acted. See, *e. g., Meyers* v. *Contra Costa County Dept. of Social Servs.*, 812 F. 2d 1154, 1157 (CA9) (holding that "social workers are entitled to absolute immunity in performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings"), cert. denied, 484 U. S. 829 (1987); *Vosburg* v. *Department of Social Servs.*, 884 F. 2d 133 (CA4 1989) (granting absolute immunity to social workers in connection with their filing of a child removal petition in juvenile court); *Snell* v. *Tunnell*, 920 F. 2d 673 (CA10 1990) (denying absolute immunity to social workers for conduct in seeking a protective custody order that did not initiate juvenile court proceedings), cert. denied, 499 U. S. 976 (1991). These courts have reasoned that social workers function as prosecutors in certain contexts, and therefore are entitled to the absolute immunity that would be due a prosecutor performing analogous functions. Cf. *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (discussing prosecutorial immunity).

Consideration of the function performed by an official seeking absolute immunity plays an important role in our immunity analysis. See, *e. g., Buckley* v. *Fitzsimmons*, 509 U. S. 259, 269 (1993). Function, however, becomes significant only when evaluated in historical context. A related inquiry precedes the functional analysis: "Our *initial* inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." *Malley* v. *Briggs*, 475 U. S. 335, 339–340 (1986) (emphasis added). Although § 1983 "on its face admits of no defense of official immunity," "[c]ertain immunities were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley, supra,* at 268 (quoting *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967)). We therefore have held that some officials are, under certain circumstances, entitled to absolute immunity. See, *e. g., Imbler, supra.* An official seeking such immunity, however, must at the outset show that a "counterpart to the privilege he asserts" was recognized at common law in 1871, for "[w]here we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under § 1983." *Burns* v. *Reed*, 500 U. S. 478, 498 (1991) (SCALIA, J., concurring in judgment in part and dissenting in part).

The courts that have accorded absolute immunity to social workers appear to have overlooked the necessary historical inquiry; none has seriously considered whether social workers enjoyed absolute immunity for their official duties in 1871. If they did not, absolute immunity is unavailable to social workers under § 1983. See *ibid.* This all assumes, of course, that "social workers" (at least as we now understand the term) even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes (at least) more difficult to maintain. Cf. *Antoine* v. *Byers & Anderson, Inc.*, 508 U. S. 429 (1993) (denying court reporter absolute immunity in large part because official court reporters did not begin appearing in state courts until the late 19th century).

It may be argued that the Sixth Circuit and other courts *have* effectively identified a common-law counterpart to the modern social worker for purposes of the immunity analysis: the 1871 prosecutor. In reasoning that the social worker functions as a prosecutor in performing certain duties, these courts essentially have suggested that, by analogy, the historically rooted immunity for prosecutors should apply to social workers. In the absence of a detailed examination of the immunity (if any) that applied to social workers in 1871, however, such an analogy must be suspect. But even putting historical concerns aside, it is not clear to me that the functional analysis of the Sixth Circuit is correct. I am not convinced that social workers, who often are involved in civil family welfare proceedings, can ever function as prosecutors for purposes of § 1983 immunity analysis. Cf. *Imbler, supra,* at 430 (absolute prosecutorial immunity extends to those functions "intimately associated with the judicial phase of the *criminal process*") (emphasis added).

Of course, the decision below and other decisions granting absolute immunity to social workers may be premised more on the notion that absolute immunity serves important policy concerns than on either historical or functional analyses. See, *e. g., Meyers,* 812 F. 2d, at 1157. To the extent they are so based, they are misguided: The federal courts "do not have a license to establish immunities from § 1983 actions in the interests of what [they] judge to be sound public policy." *Tower* v. *Glover,* 467 U. S. 914, 922–923 (1984).

We should address the important threshold question whether social workers are, under *any* circumstances, entitled to absolute immunity. Accordingly, I respectfully dissent.

No. 93–1402. SOLICK *v.* PARIS ACCESSORIES, INC. C. A. 3d Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–7098. RICHLEY *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir.;

No. 93–7167. HOLMES ET AL. *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir.;

No. 93–7287. SMITH *v.* INDIANA. Sup. Ct. Ind.;

No. 93–7378. MADISON *v.* TEXAS. Ct. Crim. App. Tex.;

No. 93–7730. ELKINS *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 93–7777. BARNES *v.* TEXAS. Ct. Crim. App. Tex.; and

No. 93–8105. WEST *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 93–7098, 998 F. 2d 1426; No. 93–7167, 998 F. 2d 1426; No. 93–7287, 613 N. E. 2d 412; No. 93–7730, 312 S. C. 541, 436 S. E. 2d 178; No. 93–8105, 176 Ariz. 432, 862 P. 2d 192.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93–7765. MERLOS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. JUSTICE GINSBURG took no part in the consideration or decision of this petition. Reported below: 984 F. 2d 1239.

No. 93–8161. HOLT *v.* JONES, ASSISTANT WARDEN, ET AL. C. A. 5th Cir. Motion of petitioner to strike brief in opposition and for sanctions denied. Certiorari denied. Reported below: 12 F. 3d 209.

Rehearing Denied

No. 93–980. ANDRISANI *v.* SUPERIOR COURT OF CALIFORNIA, APPELLATE DEPARTMENT, COUNTY OF LOS ANGELES, ET AL., 510 U. S. 1115;

No. 93–1161. IVIMEY ET AL. *v.* AMERICAN BANK OF CONNECTICUT, 510 U. S. 1178;

No. 93–6591. KIM *v.* REICH, SECRETARY OF LABOR, 510 U. S. 1053;

No. 93–7425. KEEGAN *v.* FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, 510 U. S. 1180;

No. 93–7426. PARRIS *v.* CUTHBERT ET AL., 510 U. S. 1180;

No. 93–7464. ABIDEKUN *v.* COMMISSIONER OF SOCIAL SERVICE OF THE CITY OF NEW YORK, 510 U. S. 1168;

No. 93–7532. COPELAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL., 510 U. S. 1181; and

No. 93–7558. MOSLEY *v.* COUNTY OF CLARK, 510 U. S. 1181. Petitions for rehearing denied.

No. 93–1226. IN RE KUONO, 510 U. S. 1175. Motion of petitioner for leave to amend the petition for rehearing denied. Petition for rehearing denied.

APRIL 26, 1994

Certiorari Denied

No. 93–8829 (A–881). ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DI-

VISION, ET AL. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 18 F. 3d 1208.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

Rehearing Denied

No. 93–8829. ANDERSON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, ET AL., *supra,* p. 1064. Petition for rehearing denied.

APRIL 27, 1994

Certiorari Denied

No. 93–8860 (A–895). SPENCER *v.* WRIGHT, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

APRIL 29, 1994

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1157; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1171; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1177; and amendments to the Federal Rules of Evidence, see *post,* p. 1189.)

MAY 2, 1994

Miscellaneous Orders. (See also No. 93–8312, *ante*, p. 364.)

No. ———. LUMMI INDIAN TRIBE *v.* WHATCOM COUNTY, WASHINGTON. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–851. LEWIS ET AL. *v.* CASEY ET AL. Application for stay of enforcement of injunctive order of the United States District Court for the District of Arizona, case Nos. 90–0054 and 91–1808, issued October 13, 1993, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court. JUSTICE BLACKMUN, JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG would deny the application for stay.

No. D–1389. IN RE DISBARMENT OF SCHWARTZ. It is ordered that S. David Schwartz, of Santa Barbara, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1390. IN RE DISBARMENT OF DUBOW. It is ordered that Alan E. Dubow, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 108, Orig. NEBRASKA *v.* WYOMING ET AL. Motion of the Special Master for compensation and reimbursement of expenses granted, and the Special Master is awarded a total of $60,059.18 to be paid as follows: 30% by Nebraska, 30% by Wyoming, 15% by Colorado, and 25% by the United States. [For earlier order herein, see, *e. g.*, 510 U. S. 1189.]

No. 93–644. HONDA MOTOR CO., LTD., ET AL. *v.* OBERG. Sup. Ct. Ore. [Certiorari granted, 510 U. S. 1068.] Motion of respondent for leave to file a supplemental brief after argument granted.

No. 93–908. REICH *v.* COLLINS, REVENUE COMMISSIONER OF GEORGIA, ET AL. Sup. Ct. Ga. [Certiorari granted, 510 U. S. 1109.] Motion of James B. Beam Distilling Co. for leave to file a brief as *amicus curiae* granted.

No. 93–1103. DUBUQUE PACKING CO., INC. *v.* UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AFL–CIO, LOCAL NO. 150–A, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1016.] Motion of petitioner to dispense with printing the joint appendix granted. JUSTICE GINSBURG took no part in the consideration or decision of this motion.

No. 93–1197. HESS ET AL. *v.* PORT AUTHORITY TRANS-HUDSON CORPORATION. C. A. 3d Cir. [Certiorari granted, 510 U. S. 1190.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 93–1202. BRUNWASSER *v.* STEINER, 510 U. S. 1195. Motion of respondent for fees and costs granted, and respondent is awarded a total of $500 to be paid by petitioner on or before Monday, May 16, 1994.

No. 93–1340. UNITED STATES *v.* MEZZANATTO. C. A. 9th Cir. [Certiorari granted, *ante*, p. 1029.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted. Motion for appointment of counsel granted, and it is ordered that Mark R. Lippman, Esq., of La Jolla, Cal., be appointed to serve as counsel for respondent in this case.

No. 93–1408. NEW YORK STATE CONFERENCE OF BLUE CROSS & BLUE SHIELD PLANS ET AL. *v.* TRAVELERS INSURANCE CO. ET AL.;

No. 93–1414. CUOMO, GOVERNOR OF NEW YORK, ET AL. *v.* TRAVELERS INSURANCE CO. ET AL.; and

No. 93–1415. HOSPITAL ASSOCIATION OF NEW YORK STATE *v.* TRAVELERS INSURANCE CO. ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 93–7407. O'NEAL *v.* MCANINCH, WARDEN. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1017.] Motion for appointment of counsel granted, and it is ordered that Thomas R. Wetterer, Jr., Esq., of Columbus, Ohio, be appointed to serve as counsel for petitioner in this case.

No. 93–8132. In re Carter;
No. 93–8135. In re Zzie;
No. 93–8141. In re Walker;
No. 93–8325. In re Adams; and
No. 93–8589. In re Jones. Petitions for writs of mandamus denied.

Certiorari Denied

No. 92–737. Johnson *v.* Uncle Ben's, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 965 F. 2d 1363.

No. 92–793. Peterson *v.* Adventist Health System/Sunbelt, Inc., dba Huguley Memorial Seventh-day Adventist Medical Center, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 971 F. 2d 748.

No. 92–977. Luddington *v.* Indiana Bell Telephone Co. C. A. 7th Cir. Certiorari denied. Reported below: 966 F. 2d 225.

No. 92–980. Holt *v.* Michigan Department of Corrections. C. A. 6th Cir. Certiorari denied. Reported below: 974 F. 2d 771.

No. 92–1190. Gersman et al. *v.* Group Health Assn., Inc. C. A. D. C. Cir. Certiorari denied. Reported below: 975 F. 2d 886.

No. 92–1538. Hicks *v.* Brown Group, Inc., dba Brown Shoe Co., Inc. C. A. 8th Cir. Certiorari denied. Reported below: 982 F. 2d 295.

No. 92–1721. Harris *v.* American Medical International, Inc., et al. C. A. 10th Cir. Certiorari denied. Reported below: 982 F. 2d 528.

No. 92–1774. Huey *v.* Shalala, Secretary of Health and Human Services. C. A. 8th Cir. Certiorari denied. Reported below: 971 F. 2d 1362.

No. 92–1923. Lacey *v.* Dow Co., dba Dow Chemical U. S. A. C. A. 5th Cir. Certiorari denied. Reported below: 987 F. 2d 771.

No. 93–673. Dickinson *v.* Ohio Bell Communications, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 996 F. 2d 1214.

No. 93–800. Mojica *v.* Gannett Co., Inc., Owner of WGCI–FM Radio Station. C. A. 7th Cir. Certiorari denied. Reported below: 7 F. 3d 552.

No. 93–1114. Winston *v.* Maine Terminal College System et al. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 631 A. 2d 70.

No. 93–1131. Kidd et ux. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 27.

No. 93–1254. Federacion de Maestros de Puerto Rico *v.* Puerto Rico Labor Relations Board. Sup. Ct. P. R. Certiorari denied.

No. 93–1271. Hammons *v.* United States Railroad Retirement Board. C. A. 10th Cir. Certiorari denied. Reported below: 7 F. 3d 1045.

No. 93–1275. Jacobson *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 4 F. 3d 987.

No. 93–1280. Bianco et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 998 F. 2d 1112.

No. 93–1281. Auburn Police Union et al. *v.* Carpenter, Attorney General of Maine. C. A. 1st Cir. Certiorari denied. Reported below: 8 F. 3d 886.

No. 93–1325. International Brotherhood of Electrical Workers, Local 84 *v.* Georgia Power Co. C. A. 11th Cir. Certiorari denied. Reported below: 995 F. 2d 1030.

No. 93–1350. Patriarca *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 4 F. 3d 70.

No. 93–1361. Drexel Burnham Lambert Group Inc. *v.* Committee of Receivers for A. W. Galadari et al.; and
No. 93–1389. Refco, Inc. *v.* Committee of Receivers for A. W. Galadari et al. C. A. 2d Cir. Certiorari denied. Reported below: 12 F. 3d 317.

No. 93–1385. North American Vaccine, Inc., et al. *v.* American Cyanamid Co. et al. C. A. Fed. Cir. Certiorari denied. Reported below: 7 F. 3d 1571.

No. 93–1391. Hornback *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 16 F. 3d 422.

No. 93–1392. Price, aka Loa, Individually and in His Capacity as Chief of the Hou Hawaiians, et al. *v.* Akaka et al. C. A. 9th Cir. Certiorari denied. Reported below: 3 F. 3d 1220.

No. 93–1393. Gallodoro et al. *v.* State Farm Mutual Automobile Insurance Co. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93–1400. Gotti *v.* United States; and

No. 93–1420. LoCascio *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 6 F. 3d 924.

No. 93–1406. Mihnovets *v.* Mihnovets. Ct. App. Va. Certiorari denied.

No. 93–1410. University of Colorado, Boulder, et al. *v.* Derdeyn. Sup. Ct. Colo. Certiorari denied. Reported below: 863 P. 2d 929.

No. 93–1412. Lawrence *v.* Columbia Presbyterian Medical Center. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 590.

No. 93–1423. York Rite Bodies of Freemasonry of Savannah, Georgia, et al. *v.* Board of Equalization of Chatham County, Georgia, et al. Ct. App. Ga. Certiorari denied. Reported below: 209 Ga. App. 359, 433 S. E. 2d 299.

No. 93–1424. Rawoot *v.* Signet Bank/Virginia et al. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93–1428. Glover *v.* McDonnell Douglas Corp. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 845.

No. 93–1431. Medical Engineering Corp. *v.* American Medical Systems, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 6 F. 3d 1523.

No. 93–1433. John E. Graham & Sons *v.* Bertrand. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

No. 93–1434. Advocates for Life, Inc. *v.* Lovejoy Specialty Hospital, Inc. Ct. App. Ore. Certiorari denied. Reported below: 121 Ore. App. 160, 855 P. 2d 159.

No. 93–1438. Edwards *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 243 Ill. App. 3d 280, 611 N. E. 2d 1196.

No. 93–1516. Tavarez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 392.

No. 93–1552. Valera *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93–1555. Cozad *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93–1559. Vogt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 17 F. 3d 1435.

No. 93–5574. Bush *v.* Commonwealth Edison Co. C. A. 7th Cir. Certiorari denied. Reported below: 990 F. 2d 928.

No. 93–7318. Reicher *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 7 F. 3d 1046.

No. 93–7585. Taren-Palma *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 997 F. 2d 525.

No. 93–7636. Abshire *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 226.

No. 93–7702. Raji *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 1246.

No. 93–7718. Goldman *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 10 F. 3d 961.

No. 93–7805. Molen *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1084.

No. 93–7815. President *v.* Ohio. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 3d 1464, 619 N. E. 2d 698.

No. 93–7828. Hale *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 7 F. 3d 976.

No. 93–7885. Zack *v.* Sova et al. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 237.

No. 93–8101. MEIS *v.* WYOMING DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 695.

No. 93–8114. TRIPATI *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 93–8115. WHITE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1555.

No. 93–8127. RUZICKA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 390.

No. 93–8128. PETE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93–8131. LANGLINAIS *v.* LOUISIANA. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 610 So. 2d 285.

No. 93–8133. RAY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–8134. BRACKETT *v.* PETERS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 11 F. 3d 78.

No. 93–8136. BERG *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8139. SIMON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8148. BESON *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 179 Wis. 2d 504, 508 N. W. 2d 76.

No. 93–8150. B. S. ET AL. *v.* DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 630 A. 2d 186.

No. 93–8154. SLESARIK *v.* LUNA COUNTY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 406.

No. 93–8156. HOLMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 250 Ill. App. 3d 503, 620 N. E. 2d 1222.

No. 93–8164. HOWARD *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 4 F. 3d 1000.

No. 93–8165. HAZZARD *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 93–8166. GAINER *v.* SYMINGTON, GOVERNOR OF ARIZONA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 394.

No. 93–8168. TRIPPET *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8170. REVELLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 217.

No. 93–8183. CUMMINS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8184. PONCE DE LEON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8185. ROBERSON *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 820.

No. 93–8187. LAFLAMME *v.* GOMEZ. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 537.

No. 93–8189. CRAWFORD *v.* CONNELL. Sup. Ct. Ill. Certiorari denied. Reported below: 153 Ill. 2d 558, 624 N. E. 2d 805.

No. 93–8190. PRICE *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 16 F. 3d 421.

No. 93–8191. HERNANDEZ *v.* WHITE, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 93–8194. SIMMONS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 1495.

No. 93–8195. LOPEZ GONZALEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8199. GARCIA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 93–8200. HAZZARD *v.* CITY OF OAKLAND, CALIFORNIA, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8201. Wilson *v.* Lanham et al. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 206.

No. 93–8213. Moore *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 263 Ga. 586, 436 S. E. 2d 201.

No. 93–8214. Mangrum *v.* Manghan et al. C. A. 11th Cir. Certiorari denied.

No. 93–8215. Richards *v.* Bartlett, Superintendent, Elmira Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 93–8219. Shanz *v.* Groose, Warden, et al. C. A. 8th Cir. Certiorari denied.

No. 93–8220. Duvall *v.* Administrator, Eastern Pennsylvania Psychiatric Institute, et al. C. A. 3d Cir. Certiorari denied.

No. 93–8222. Copeland *v.* Lomen et al. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 409.

No. 93–8223. Hando *v.* Shalala, Secretary of Health and Human Services. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 405.

No. 93–8225. Hillburn *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8227. Bardson *v.* Cross. Sup. Ct. Nev. Certiorari denied. Reported below: 109 Nev. 1389, 875 P. 2d 1050.

No. 93–8228. Breest *v.* Brodeur, Commissioner, New Hampshire Department of Corrections. C. A. 1st Cir. Certiorari denied.

No. 93–8246. Buchanan *v.* South Carolina. Sup. Ct. S. C. Certiorari denied.

No. 93–8247. Logan *v.* Honolulu Police Department. C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 643.

No. 93–8249. Tooze *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–8251. BENSON *v.* STEPANIK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–8256. THORNTON *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 93–8257. ALLEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 249 Ill. App. 3d 1001, 620 N. E. 2d 1105.

No. 93–8258. CROSKEY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1443.

No. 93–8259. CROCKETT *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 121 Ore. App. 442, 856 P. 2d 344.

No. 93–8260. ALLEN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 862 P. 2d 487.

No. 93–8267. DAVIS *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 93–8268. YEAMONS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8275. ZOTOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1432.

No. 93–8281. WORMUTH *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8316. PETERSON *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–8323. LOMAX *v.* STEPANIK, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–8331. CONSIGLIO *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8333. COCHRAN *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93–8338. PARISH *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 205.

No. 93–8342. BOALBEY *v.* ROCK ISLAND COUNTY ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 242 Ill. App. 3d 461, 610 N. E. 2d 769.

No. 93–8347. ATKINSON *v.* IDAHO. Ct. App. Idaho. Certiorari denied. Reported below: 124 Idaho 816, 864 P. 2d 654.

No. 93–8352. WATSON *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied. Reported below: 861 S. W. 2d 410.

No. 93–8356. JONES *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1444.

No. 93–8375. CONBOY *v.* BUREAU OF NATIONAL AFFAIRS, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 15 F. 3d 1159.

No. 93–8386. WALKER *v.* TEXAS ET AL. Sup. Ct. Tex. Certiorari denied.

No. 93–8406. BIDDINGS *v.* BRIGANO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1218.

No. 93–8433. RYLES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 36.

No. 93–8435. LUCKETTE *v.* RYAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 93–8461. CURCIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 13 F. 3d 641.

No. 93–8462. WATSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 598.

No. 93–8507. POLLARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93–8524. DRIESSE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 15 F. 3d 1202.

No. 93–8525. BURRELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–8534. Hayes *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 20.

No. 93–8539. Fultz *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1226.

No. 93–8558. Freeman *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 6 F. 3d 586.

No. 93–8572. Mock *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1216.

No. 93–8573. Parris *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 17 F. 3d 227.

No. 93–8575. Olivo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 16 F. 3d 1216.

No. 93–8576. Paradise *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 13 F. 3d 410.

No. 93–8583. Bara *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 1418.

No. 93–8587. Gray *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 15 F. 3d 1160.

No. 93–8592. Eddy *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 577.

No. 93–8593. Fox *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 418.

No. 93–8596. Reid *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93–8615. Dowell *v.* Wright et al. C. A. 4th Cir. Certiorari denied. Reported below: 10 F. 3d 806.

No. 93–1039. Colorado *v.* LaFrankie. Sup. Ct. Colo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 858 P. 2d 702.

No. 93–1395. Oklahoma *v.* Humphreys. Ct. Crim. App. Okla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 864 P. 2d 343.

No. 93–1480. ASAM *v.* HARWOOD. Sup. Ct. Ala. Motion of respondent to strike petition for writ of certiorari denied. Certiorari denied. Reported below: 639 So. 2d 960.

No. 93–1634 (A–897). ROUGEAU *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 16 F. 3d 1215.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93–7839. BAKER *v.* MARYLAND. Ct. App. Md.;
No. 93–8100. RAMSEY *v.* MISSOURI. Sup. Ct. Mo.;
No. 93–8226. FORD *v.* ALABAMA. Sup. Ct. Ala.;
No. 93–8280. TARVER *v.* ALABAMA. Ct. Crim. App. Ala.; and
No. 93–8399. MONTGOMERY *v.* OHIO; and GREER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 93–7839, 332 Md. 542, 632 A. 2d 783; No. 93–8100, 864 S. W. 2d 320; No. 93–8226, 630 So. 2d 113; No. 93–8280, 629 So. 2d 14; No. 93–8399, 67 Ohio St. 3d 1485, 621 N. E. 2d 407.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 93–1134. SIKKA *v.* WEST, SECRETARY OF THE ARMY, 510 U. S. 1177;

No. 93–6570. VANDYKE *v.* DOUGLAS VANDYKE COAL CO., INC., ET AL., 510 U. S. 1197;

No. 93–6665. GAUDREAULT *v.* UNITED STATES, 510 U. S. 1197;

No. 93–7616. GONZALEZ *v.* OCEAN COUNTY BOARD OF SOCIAL SERVICES, 510 U. S. 1201;

No. 93–7626. NEWSOME *v.* FLOYD WEST & CO., 510 U. S. 1201;
No. 93–7746. CONDON *v.* DELAWARE, *ante*, p. 1008; and
No. 93–7956. SNELLING *v.* CHRYSLER MOTORS CORP. ET AL., 510 U. S. 1207. Petitions for rehearing denied.

No. 93–6267. KALAKAY *v.* NEWBLATT, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, 510 U. S. 1049. Motion for leave to file petition for rehearing denied.

MAY 9, 1994

Miscellaneous Order

No. A–926. GACY *v.* PAGE, WARDEN. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay in order to give the applicant time to file a petition for writ of certiorari, and would grant the petition and vacate the death sentence in this case.

MAY 11, 1994

Certiorari Denied

No. 93–9063 (A–931). PICKENS *v.* TUCKER, GOVERNOR OF ARKANSAS, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 23 F. 3d 1477.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

No. 93–9087 (A–937). WHITMORE *v.* GAINES ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE BLACKMUN, and by him referred to the Court, denied. Certiorari denied. Reported below: 24 F. 3d 1032.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for writ of certiorari and would remand with instructions to enjoin petitioner's execution.

MAY 16, 1994

Certiorari Granted—Vacated and Remanded

No. 93–8310. CLEVELAND *v.* ARKANSAS. Sup. Ct. Ark. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *J. E. B.* v. *Alabama ex rel. T. B.*, *ante*, p. 127. Reported below: 315 Ark. 91, 865 S. W. 2d 285.

Miscellaneous Orders

No. — — —. WELLS *v.* AMERICAN AIRLINES ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — —. PREWITT *v.* MOLPUS, SECRETARY OF STATE OF MISSISSIPPI, ET AL. Motion of appellant to direct the Clerk to file jurisdictional statement that does not comply with the Rules of this Court and to allow appellant to represent his minor children on appeal denied.

No. 120, Orig. NEW JERSEY *v.* NEW YORK. Motion for leave to file bill of complaint granted, and defendant is allowed 60 days to file an answer. [For earlier order herein, see 510 U. S. 805.]

No. 93–1152. GARRATT *v.* MORRIS ET AL., *ante*, p. 1004. Motion of respondents for taxation of costs and award of attorney's fees denied.

No. 93–1454. CALDERON, WARDEN, ET AL. *v.* CLAIR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 93-8394. DiDomenico *v.* Berk et al. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 6, 1994, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 93-8711. In re Nolt. Petition for writ of habeas corpus denied.

No. 93-8364. In re Human; and
No. 93-8519. In re Preuss. Petitions for writs of mandamus denied.

Certiorari Denied

No. 93-667. Autery, Administratrix of the Estate of Autery, Deceased, et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 992 F. 2d 1523.

No. 93-1032. Ratelle, Warden *v.* Crawford. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 535.

No. 93-1188. Woolsey *v.* National Transportation Safety Board et al. C. A. 5th Cir. Certiorari denied. Reported below: 993 F. 2d 516.

No. 93-1212. Graves *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 1546.

No. 93-1287. LeFlore *v.* Marvel Entertainment Group et al. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 237.

No. 93-1301. Jurcev et al. *v.* Central Community Hospital et al. C. A. 7th Cir. Certiorari denied. Reported below: 7 F. 3d 618.

No. 93-1305. 383 Madison Associates *v.* City of New York et al. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 193 App. Div. 2d 518, 598 N. Y. S. 2d 180.

No. 93-1310. West et al. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 423.

No. 93-1316. Walsh *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 659.

No. 93–1322. PUIG-MIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1546.

No. 93–1329. DIPINTO ET AL. *v.* SPERLING ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 9 F. 3d 2.

No. 93–1342. TANNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 109.

No. 93–1372. EVANS *v.* CITY OF CHICAGO; and
No. 93–1373. BALARK ET AL. *v.* CITY OF CHICAGO. C. A. 7th Cir. Certiorari denied. Reported below: 10 F. 3d 474.

No. 93–1421. AUS ET AL. *v.* ARMCO, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 104.

No. 93–1435. BOARD OF GOVERNORS OF REGISTERED DENTISTS OF OKLAHOMA *v.* JACOBS. Ct. App. Okla. Certiorari denied.

No. 93–1440. THIRD NATIONAL BANK IN NASHVILLE *v.* COMMISSIONER OF INSURANCE OF LOUISIANA. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 622 So. 2d 275.

No. 93–1443. MAKIN *v.* EVANS ET AL. Ct. App. Ore. Certiorari denied.

No. 93–1444. MASSACHUSETTS ET AL. *v.* GATELY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 2 F. 3d 1221.

No. 93–1452. TREGONING ET AL. *v.* AMERICAN COMMUNITY MUTUAL INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 79.

No. 93–1453. DIAZ DEL CASTILLO *v.* AEROSERVICE AVIATION CENTER, INC. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 624 So. 2d 285.

No. 93–1457. DALESKE ET AL. *v.* FAIRFIELD COMMUNITIES, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 17 F. 3d 321.

No. 93–1460. KOELKER *v.* KOELKER. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–1465. SIMMONS *v.* PRYOR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 555.

No. 93–1466. T–H New Orleans Limited Partnership *v.* Financial Security Assurance, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 10 F. 3d 1099.

No. 93–1477. Tatum *v.* Philip Morris Inc., dba Philip Morris USA, et al. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 417.

No. 93–1481. Hinton *v.* Pacific Enterprises et al. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 391.

No. 93–1482. Rose, Widow of Rose *v.* Westmoreland Coal Co. et al. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 205.

No. 93–1487. United Steelworkers of America, AFL–CIO–CLC *v.* Warrior & Gulf Navigation Co. C. A. 11th Cir. Certiorari denied. Reported below: 996 F. 2d 279.

No. 93–1491. Tonka Corp. *v.* Bituminous Casualty Corp. et al. C. A. 8th Cir. Certiorari denied. Reported below: 9 F. 3d 51.

No. 93–1492. Grand Lodge of Texas (Ancient, Free, and Accepted Masons), as Trustee for Masonic Home and School of Texas, et al. *v.* Gant. C. A. 10th Cir. Certiorari denied. Reported below: 12 F. 3d 998.

No. 93–1493. Kahn et al. *v.* Virginia Retirement System et al. C. A. 4th Cir. Certiorari denied. Reported below: 13 F. 3d 110.

No. 93–1494. Tuskegee Area Transportation System *v.* National Labor Relations Board. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1499.

No. 93–1496. Missouri Pacific Railroad Co., dba Union Pacific Railroad Co. *v.* Tingstrom. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 630 So. 2d 257.

No. 93–1497. Bseirani et al. *v.* Mahshie et al. C. A. 2d Cir. Certiorari denied. Reported below: 4 F. 3d 1071.

No. 93–1498. Sakaria et al. *v.* Trans World Airlines. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 164.

No. 93–1499. WHEELER *v.* NEBRASKA STATE BAR ASSN. Sup. Ct. Neb. Certiorari denied. Reported below: 244 Neb. 786, 508 N. W. 2d 917.

No. 93–1501. ZIEGLER *v.* BOARD OF BAR EXAMINERS OF DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 637 A. 2d 829.

No. 93–1502. SAMURA *v.* KAISER FOUNDATION HEALTH PLAN, INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 17 Cal. App. 4th 1284, 22 Cal. Rptr. 2d 20.

No. 93–1506. MICKLER *v.* NIMISHILLEN & TUSCARAWAS RAILWAY CO. C. A. 6th Cir. Certiorari denied. Reported below: 13 F. 3d 184.

No. 93–1507. REISKIN ET AL. *v.* DEPARTMENT OF WATER SUPPLY/MAUI COUNTY, ET AL. Sup. Ct. Haw. Certiorari denied. Reported below: 75 Haw. 581, 895 P. 2d 1193.

No. 93–1509. KEE *v.* PROVIDENT LIFE & ACCIDENT INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 961 F. 2d 1581 and 1582.

No. 93–1512. INTERSTATE INDEPENDENT CORP. ET AL. *v.* OHIO EX REL. ROSZMANN, PROSECUTING ATTORNEY, FAYETTE COUNTY, OHIO. Ct. App. Ohio, Fayette County. Certiorari denied. Reported below: 89 Ohio App. 3d 775, 627 N. E. 2d 629.

No. 93–1514. MAGNOLIA COURT APARTMENTS, INC. *v.* CARLSON, COMMISSIONER, DEPARTMENT OF HOUSING OF ATLANTA, ET AL. Ct. App. Ga. Certiorari denied. Reported below: 211 Ga. App. XXX.

No. 93–1515. MEGGERS ET AL. *v.* EXXON CO. U. S. A. ET AL. Sup. Ct. Va. Certiorari denied.

No. 93–1517. PAYNE *v.* NEWPORT NEWS SHIPBUILDING & DRY DOCK CO., INC. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–1518. CONSTANT *v.* ADVANCED MICRO-DEVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1105.

No. 93–1520. ATTORNEY GENERAL OF NEW YORK *v.* MOODY. Ct. App. N. Y. Certiorari denied. Reported below: 83 N. Y. 2d 65, 629 N. E. 2d 378.

No. 93–1521. Setlech *v.* United States et al. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 390.

No. 93–1523. Graff *v.* City of Chicago. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1309.

No. 93–1524. Tregenza et al. *v.* Great American Communications Co. et al. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 717.

No. 93–1529. Picray *v.* City of Des Moines, Iowa, et al. Ct. App. Iowa. Certiorari denied. Reported below: 515 N. W. 2d 574.

No. 93–1530. Cassell *v.* Lancaster Mennonite Conference et al. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 402.

No. 93–1538. Gill *v.* Vidmark, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1107.

No. 93–1554. Paddio *v.* Board of Trustees for State Colleges and Universities of Louisiana et al. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 207.

No. 93–1575. Calderon, Warden *v.* Johnson. C. A. 9th Cir. Certiorari denied. Reported below: 3 F. 3d 1327.

No. 93–1595. Rose *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93–1627. United States Lines, Inc. *v.* Public Administrator of the County of New York, Administrator of the Estate of Valverde, Deceased. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 197 App. Div. 2d 392, 603 N. Y. S. 2d 20.

No. 93–7385. Shorthouse *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 7 F. 3d 149.

No. 93–7394. McClendon *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7510. Belmonte Romero *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–7610. **Grajeda** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7612. **Fonville** *v.* **United States.** C. A. 4th Cir. Certiorari denied. Reported below: 5 F. 3d 781.

No. 93–7634. **Mala** *v.* **United States.** C. A. 1st Cir. Certiorari denied. Reported below: 7 F. 3d 1058.

No. 93–7640. **Munguia** *v.* **Director, Office of Workers' Compensation Programs, Department of Labor, et al.** C. A. 5th Cir. Certiorari denied. Reported below: 999 F. 2d 808.

No. 93–7643. **Mancilla** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 21.

No. 93–7665. **Cain** *v.* **Missouri.** Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 859 S. W. 2d 715.

No. 93–7722. **Christeson** *v.* **Groose, Superintendent, Jefferson City Correctional Center.** C. A. 8th Cir. Certiorari denied.

No. 93–7795. **Benson** *v.* **United States et al.** C. A. 8th Cir. Certiorari denied. Reported below: 5 F. 3d 531.

No. 93–7838. **Collins** *v.* **United States.** C. A. 11th Cir. Certiorari denied. Reported below: 3 F. 3d 443.

No. 93–7912. **Dunham** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93–7934. **Lawson** *v.* **United States.** C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1546.

No. 93–7970. **Crook** *v.* **United States.** C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1422.

No. 93–8000. **Aguilar** *v.* **United States.** C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 1226.

No. 93–8008. **Chase** *v.* **California**; and

No. 93–8303. **Hankins** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8033. **Stoddard** *v.* **California.** Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8061. Barber *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 11 F. 3d 1143.

No. 93–8142. Snavely *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 4 F. 3d 1000.

No. 93–8180. Dunbar *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 541.

No. 93–8216. Wright *v.* Wright et al. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 206.

No. 93–8248. Lewis *v.* Maass, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1107.

No. 93–8261. Clark *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8263. Dunlap *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 18 Cal. App. 4th 1468, 23 Cal. Rptr. 2d 204.

No. 93–8265. Alexander *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8266. Borbon *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8269. Woodruff *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8270. Whiting *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 13 F. 3d 410.

No. 93–8271. Hill *v.* Ohio. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 93–8272. Gaydos *v.* Chertoff, United States Attorney, et al. C. A. 3d Cir. Certiorari denied.

No. 93–8278. Wright *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8288. Allen *v.* Lockley et al. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 392.

No. 93-8291. Wilson *v.* City of Chicago et al. C. A. 7th Cir. Certiorari denied. Reported below: 6 F. 3d 1233.

No. 93-8293. Davilla *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93-8294. Directo *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8298. Shoop *v.* Dauphin County et al. C. A. 3d Cir. Certiorari denied. Reported below: 9 F. 3d 1541.

No. 93-8301. Horton *v.* North Carolina. Sup. Ct. N. C. Certiorari denied.

No. 93-8302. Araujo Juarez *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93-8304. Johnson *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93-8313. Attwood *v.* Chiles, Governor of Florida, et al. (three cases). C. A. 11th Cir. Certiorari denied.

No. 93-8315. Ruchti *v.* Hedley et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8317. Rogers *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93-8318. McDonough *v.* Angelone, Director, Nevada Department of Prisons, et al. C. A. 9th Cir. Certiorari denied.

No. 93-8321. Moody *v.* Rivers et al. C. A. 5th Cir. Certiorari denied.

No. 93-8322. Ross *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93-8326. Smith *v.* Borg, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 1 F. 3d 1247.

No. 93-8327. Gear *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 19 Cal. App. 4th 86, 23 Cal. Rptr. 2d 261.

No. 93–8328. HOZDISH *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 93–8332. IKPOH *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 242 Ill. App. 3d 365, 609 N. E. 2d 1025.

No. 93–8335. GREENE *v.* ALBEMARLE-CHARLOTTESVILLE JOINT SECURITY COMPLEX. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 594.

No. 93–8339. RICE *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–8340. ALVARCA ALVAREZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8343. SPYCHALA *v.* GOMEZ. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–8344. ALLEN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8346. LAESSIG *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–8348. BERNABE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8349. CALVERT *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 18 Cal. App. 4th 1820, 23 Cal. Rptr. 2d 644.

No. 93–8350. DIAZ-ROSAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 13 F. 3d 1305.

No. 93–8351. TIZENO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8354. WOOD *v.* LARSON. C. A. 9th Cir. Certiorari denied.

No. 93–8355. HARRIS *v.* RAEMISCH ET AL. C. A. 7th Cir. Certiorari denied.

No. 93-8361. Green *v.* Roberts, Deputy Secretary, Kansas Division of Facility Management, et al. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 405.

No. 93-8363. Human *v.* City of Santa Monica, California. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 537.

No. 93-8367. Dunn *v.* Regents of the University of California. C. A. 9th Cir. Certiorari denied.

No. 93-8370. Snider *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93-8373. Cornejo *v.* California. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 93-8374. Berry *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8377. Howard *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93-8379. Armesto *v.* Weidner. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 615 So. 2d 707.

No. 93-8383. Young *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8385. Waugh *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 263 Ga. 691, 437 S. E. 2d 297.

No. 93-8388. Alls *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 83 N. Y. 2d 94, 629 N. E. 2d 1018.

No. 93-8392. Aguirre *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93-8398. Lashley *v.* Rocha, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 93-8400. Flores *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93-8401. Fromal *v.* Virginia State Bar Disciplinary Board. Sup. Ct. Va. Certiorari denied.

No. 93-8404. Blow *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 10 F. 3d 1044.

No. 93–8413. Rosser *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–8416. McMurray *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8418. Morin *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8419. Marshall *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8420. Roldan *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8421. Lofton *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8422. Pugh *v.* California. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 93–8424. Galloway *v.* Thurman, Warden. Sup. Ct. Cal. Certiorari denied.

No. 93–8425. Hunter *v.* White, Warden. Sup. Ct. Cal. Certiorari denied.

No. 93–8430. Scott *v.* Delo, Superintendent, Potosi Correctional Center. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 1103.

No. 93–8434. Laird *v.* Pizzulli. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8436. Reid *v.* City of Flint et al. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 234.

No. 93–8438. Ledet *v.* 15th Judicial District Court et al. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 181.

No. 93–8439. Clinton *v.* Smith, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1543.

No. 93–8440. Duffey *v.* Abbott, Warden. C. A. 11th Cir. Certiorari denied.

No. 93–8443. Favors *v.* California. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 93–8445. Corethers *v.* Fuerst et al. C. A. 6th Cir. Certiorari denied.

No. 93–8446. Dorado *v.* Maryland. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93–8447. Bengali et al. *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 1207.

No. 93–8454. Silva *v.* California. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8455. Arce-Ramos *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 12 F. 3d 1.

No. 93–8458. Woods *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 93–8460. Seagrave *v.* County of Lake et al. C. A. 9th Cir. Certiorari denied.

No. 93–8465. Westfall *v.* Whitley, Warden. C. A. 5th Cir. Certiorari denied.

No. 93–8470. Breckenridge *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8471. Warenczuk *v.* Pennsylvania Department of Transportation. Sup. Ct. Pa. Certiorari denied. Reported below: 534 Pa. 623, 633 A. 2d 1167.

No. 93–8480. Dempsey *v.* Rangaire Corp. Super. Ct. Mass., Middlesex County. Certiorari denied.

No. 93–8481. Hoffman *v.* Webster County Sheriff's Department, Marshfield, Missouri, et al. C. A. 8th Cir. Certiorari denied.

No. 93–8482. Eldridge *v.* Johnson et al. C. A. D. C. Cir. Certiorari denied.

No. 93–8483. Jordan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–8484. Holmes, aka Richards *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 93–8486. Grieco *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 626 So. 2d 968.

No. 93–8494. Hawkins *v.* Green et al. Sup. Ct. Ala. Certiorari denied. Reported below: 639 So. 2d 960.

No. 93–8495. Kelly *v.* Deco Records et al. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 818.

No. 93–8496. Kukes *v.* Calderon, Warden. C. A. 9th Cir. Certiorari denied.

No. 93–8497. Forster *v.* New Hampshire et al. C. A. 1st Cir. Certiorari denied. Reported below: 14 F. 3d 44.

No. 93–8502. Ibarra-Arreola *v.* Nevada. Sup. Ct. Nev. Certiorari denied. Reported below: 109 Nev. 1401, 875 P. 2d 1063.

No. 93–8504. Benavides *v.* United States et al. C. A. 5th Cir. Certiorari denied.

No. 93–8511. Nyberg *v.* Singletary, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 167.

No. 93–8518. Kotas et ux. *v.* Journal Communications et al. C. A. 7th Cir. Certiorari denied.

No. 93–8526. Deane *v.* Smith, Warden. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93–8528. Lyle *v.* Michigan Department of Corrections. Sup. Ct. Mich. Certiorari denied. Reported below: 444 Mich. 956, 514 N. W. 2d 767.

No. 93–8535. Cockrell *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 18 F. 3d 1156.

No. 93–8536. Prince *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 315 Ark. 492, 868 S. W. 2d 77.

No. 93–8543. Yeager *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93–8549. Cureton *v.* Mitchell, Superintendent, Eastern Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 392.

No. 93-8556. JACKSON ET UX. *v.* CITY OF RENO. C. A. 9th Cir. Certiorari denied.

No. 93-8562. SHABAZZ, AKA HURLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 191 App. Div. 2d 832, 594 N. Y. S. 2d 464.

No. 93-8582. ARNOLD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 11 F. 3d 597.

No. 93-8590. HUGGINS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 93-8597. BARBER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 602.

No. 93-8606. TILMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1094.

No. 93-8607. VAUGHAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 13 F. 3d 1186.

No. 93-8610. BULGER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 13 F. 3d 949.

No. 93-8611. HULL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93-8617. HANSON *v.* PASSER, CHIEF EXECUTIVE OFFICER, ANOKA COUNTY ADULT DETENTION FACILITY. C. A. 8th Cir. Certiorari denied. Reported below: 13 F. 3d 275.

No. 93-8623. ZUNIGA-ROSALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 33.

No. 93-8626. SAENZ SOLIZ, AKA SAENZ SALAIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-8632. STEWART *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 93-8633. RAMIREZ-GALVAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93-8637. KENNEMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93–8638. Johnson, aka Good *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 827.

No. 93–8642. Fullwood *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 59.

No. 93–8643. Barmore *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93–8648. Stephenson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93–8649. Tucker *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 57.

No. 93–8652. Sims-Robertson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93–8653. Wallace *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1500.

No. 93–8655. Serna Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1350.

No. 93–8658. Butt *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 412.

No. 93–8666. Collins *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 179.

No. 93–8667. Barker *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 58.

No. 93–8672. Herrera *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 13 F. 3d 409.

No. 93–8675. Gonzalez-Lerma *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 14 F. 3d 1479.

No. 93–8676. Harris *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1229.

No. 93–8677. Naranjo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 14 F. 3d 145.

No. 93–8680. Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 54.

No. 93–8681. MESSER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 998 F. 2d 1023.

No. 93–8682. REAVES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 13 F. 3d 711.

No. 93–8686. WELCH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 15 F. 3d 1202.

No. 93–8700. EL-MASRI, AKA MASRI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 207.

No. 93–8705. WALKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1245.

No. 93–8713. MIHALEK *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 1548.

No. 93–8714. BARRETO *v.* MCCLELLAN, SUPERINTENDENT, SOUTHPORT CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 93–8729. NADER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–8733. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 315.

No. 93–8738. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 475.

No. 93–8741. CUEVAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 110.

No. 93–8742. BURKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8743. BURCIAGA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 17 F. 3d 1437.

No. 93–8744. BROUSSARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 103.

No. 93–8745. BRAGG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 179.

No. 93–8746. RIVAS-CORDOVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 236.

No. 93–8748. WEBER *v.* MURPHY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 15 F. 3d 691.

No. 93–8749. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–8756. SNITKIN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1432.

No. 93–8787. PRUDHOME *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 13 F. 3d 147.

No. 93–8788. LEJARDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 57.

No. 93–8789. POPE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–1272. ANDERSEN *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE THOMAS took no part in the consideration or decision of this petition. Reported below: 8 F. 3d 25.

No. 93–1495. LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BLAZAK. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 1 F. 3d 891.

No. 93–1500. SOWDERS, WARDEN *v.* CARTER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 5 F. 3d 975.

No. 93–6047. WILLS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

JUSTICE O'CONNOR, concurring.

As JUSTICE BLACKMUN details, *post,* p. 1098, petitioner appears to have a strong claim under *Penry* v. *Lynaugh,* 492 U. S. 302 (1989), that the jury at his capital sentencing trial was unable to give mitigating effect to his mental retardation. It has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below. See *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, *unless* the State court exerted its jurisdiction [over them on rehearing]") (emphasis added). Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of *Penry* to the facts of petitioner's case. Petitioner is free to bring his *Penry* claim to the attention of the Texas courts in a postconviction proceeding. See *Ex parte Kunkle,* 852 S. W. 2d 499, 502, n. 3 (Tex. Crim. App. 1993) (*Penry* claims are cognizable in state habeas despite an applicant's failure to raise them on direct appeal). If he is unsuccessful in state court, petitioner can proceed to federal court and petition for a writ of habeas corpus. Because these avenues of relief are sufficient to afford full review of petitioner's substantial constitutional claim, I concur in the denial of the petition for a writ of certiorari.

JUSTICE BLACKMUN, dissenting.

Petitioner Bobby Joe Wills, a mentally retarded capital defendant who was 17 at the time of his offense, was sentenced to death in Texas without the jury's being allowed to give mitigating effect to his mental impairment. Petitioner's death sentence thus was imposed in direct violation of *Penry* v. *Lynaugh,* 492 U. S. 302 (1989), and is devoid of the reliability the Constitution requires before death can be the appropriate punishment. See *Woodson* v. *North Carolina,* 428 U. S. 280, 305 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

Petitioner has an IQ of 61.[1] At his trial in 1985, petitioner's counsel introduced evidence of petitioner's mental retardation to challenge only the reliability of his confession and his *mens rea* to commit the offense. At the close of the guilt phase, the prosecutor admonished the jury not to "'have any sympathy for the defendant because he's a little slow or he's borderline mentally retarded . . . . Don't say, Poor Old Bobby Joe, he's a little slow, he's borderline mentally retarded. Let's give him a break.'"

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[1] At the time of petitioner's trial, the American Association on Mental Retardation classified individuals with an IQ score between 50–55 and 70 as having "mild" retardation. See *Penry* v. *Lynaugh,* 492 U. S. 302, 308, n. 1 (1989). In 1992, the association revised its classification to identify individuals with an IQ of 75 or below as presumptively retarded. See AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 14 (9th ed. 1992).

Pet. for Cert. 10. At the penalty phase, the jurors were asked to answer Texas' two standard "special issues": "Did [Wills] act deliberately when he murdered . . . ? Is there a probability that he will be dangerous in the future?" See *Penry*, 492 U. S., at 320. The prosecutor repeatedly commanded the jurors to consider only these questions and reminded them: "'You're not asked, "Was the defendant given an unfair chance at life?"'" Pet. for Cert. 11. After reviewing petitioner's unstable past, the prosecutor concluded that "all the counselors and all the psychologists and all the teachers and all the case workers and all the supervisors can't do anything for Bobby Joe Wills. *They can't rehabilitate Bobby Joe Wills.*" *Ibid.* (emphasis added). The jury returned affirmative answers to both special issues and sentenced petitioner to death.

Penry v. *Lynaugh* was decided while petitioner's direct appeal was pending. Recognizing that mental retardation may render a defendant "less morally 'culpable than defendants who have no such excuse,'" 492 U. S., at 322, quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring), this Court held that Texas' execution of a mentally retarded defendant, without the jury's being instructed that it could consider and give mitigating effect to his mental impairment in imposing sentence, would violate the Eighth Amendment. A rational juror, this Court observed, readily could conclude that a mentally retarded capital defendant had killed deliberately and was likely to be dangerous in the future, while also concluding that mercy and the defendant's reduced culpability for the crime made his execution inappropriate. Texas' capital sentencing scheme allowed a jury to give effect to the former conclusion but not the latter, and thus eliminated "a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson*, 428 U. S., at 304 (opinion of Stewart, Powell, and STEVENS, JJ.).

Like Penry, petitioner was condemned to die by the State of Texas without the jury's ever having had an opportunity to give a "reasoned *moral* response to the defendant's background, character, and crime." *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring). His sentence therefore runs the constitutionally intolerable risk that the death penalty has been imposed despite the presence of factors that may justify a sentence less than death.

See *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (opinion of Burger, C. J.).[2]

It is possible that petitioner's claims may be better addressed in state and federal postconviction proceedings. Even if I did not believe that the death penalty cannot be fairly administered within the constraints of our Constitution, see *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994) (BLACKMUN, J., dissenting from denial of certiorari), however, because the execution of this mentally retarded juvenile offender would constitute a miscarriage of justice, I would grant the petition, vacate the death sentence, and remand for resentencing. I therefore dissent.

No. 93–6750. MANN *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 93–7505. ALEXANDER *v.* TEXAS. Ct. Crim. App. Tex.;

No. 93–8029. MAREK *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;

No. 93–8205. HOOKS *v.* OKLAHOMA. Ct. Crim. App. Okla.;

No. 93–8329. HALLFORD *v.* ALABAMA. Ct. Crim. App. Ala.;

No. 93–8405. CODE *v.* LOUISIANA. Sup. Ct. La.;

No. 93–8550. BEUKE *v.* OHIO. Sup. Ct. Ohio;

No. 93–8585. CHAMBERS *v.* TEXAS. Ct. Crim. App. Tex.;

No. 93–8717. BUELL *v.* OHIO. Sup. Ct. Ohio; and

No. 93–8736. CONKLIN *v.* ZANT, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: No. 93–6750, 856 P. 2d 992;

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[2] Petitioner additionally claims that the execution of mentally retarded juvenile offenders is cruel and unusual punishment in violation of the Eighth Amendment. This Court has recognized that youth, like mental retardation, reduces a defendant's criminal culpability and may render the imposition of society's ultimate retributive sanction inappropriate. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 115–116 (1982); *Thompson* v. *Oklahoma*, 487 U. S. 815 (1988) (striking death sentence for juvenile offender under age 16); but see *Stanford* v. *Kentucky*, 492 U. S. 361 (1989) (declining to declare capital punishment *per se* invalid for juvenile offenders age 16 or older). That such executions violate society's "evolving standards of decency," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), is consistent, of course, with international practice, which condemns the execution of both the mentally disabled and juvenile offenders. At least 72 countries that *retain* the death penalty restrict its administration to persons age 18 or over at the time of the offense. Amnesty International, Open Letter to the President on the Death Penalty 8, n. 10 (1994). The United States thus "stands almost alone in the world in still executing offenders who were under-18 at the time of the crime." *Id.*, at 8. See generally W. Schabas, The Abolition of the Death Penalty in International Law (1993).

No. 93-7505, 866 S. W. 2d 1; No. 93-8029, 626 So. 2d 160; No. 93-8205, 862 P. 2d 1273; No. 93-8329, 629 So. 2d 6; No. 93-8405, 627 So. 2d 1373; No. 93-8550, 67 Ohio St. 3d 1500, 622 N. E. 2d 649; No. 93-8585, 866 S. W. 2d 9; No. 93-8717, 67 Ohio St. 3d 1500, 622 N. E. 2d 649.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93-8371. ADESANYA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 996 F. 2d 1223.

Rehearing Denied

No. 92-9049. SANDOVAL *v.* CALIFORNIA, *ante*, p. 1;

No. 93-946. WULIGER *v.* UNITED STATES, 510 U. S. 1191;

No. 93-1063. HAYWARD ET AL. *v.* UNITED STATES, *ante*, p. 1004;

No. 93-1219. WILSON *v.* SOUTHERN RAILWAY CO. ET AL., 510 U. S. 1195;

No. 93-1311. BURCHILL *v.* KISH ET AL., *ante*, p. 1006;

No. 93-6585. STRIBLING *v.* COLLINS ET AL., 510 U. S. 1053;

No. 93-7195. WARREN *v.* CITY OF GRAND RAPIDS, 510 U. S. 1127;

No. 93-7257. HARRIS *v.* CAMPBELL, JUDGE, CIRCUIT COURT OF MISSOURI, ST. LOUIS COUNTY, 510 U. S. 1130;

No. 93-7429. POOLE *v.* CITY OF KILLEEN ET AL., 510 U. S. 1180;

No. 93-7488. PAWLAK *v.* PENNSYLVANIA BOARD OF LAW EXAMINERS, 510 U. S. 1215;

No. 93-7551. COTTON *v.* KANSAS, 510 U. S. 1199;

No. 93-7562. MCCONNELL *v.* ARMONTROUT, WARDEN, ET AL., 510 U. S. 1200;

No. 93-7570. SIPOS *v.* WILLIAMSON, 510 U. S. 1200;

No. 93-7575. FRANKLIN *v.* MICHIGAN, 510 U. S. 1200;

No. 93-7658. KLEINSCHMIDT *v.* GATOR OFFICE SUPPLY & FURNITURE, INC., ET AL., 510 U. S. 1202;

No. 93-7673. BLACKSTON *v.* SKARBNIK ET AL., 510 U. S. 1202;

No. 93-7721. SANFORD *v.* ALAMEDA-CONTRA COSTA TRANSIT DISTRICT ET AL., *ante*, p. 1007;

No. 93-7723. SWEENEY *v.* CIVIL SERVICE COMMISSION, *ante*, p. 1007;

No. 93-7728. WILLIAMS *v.* PINE BLUFF SCHOOL DISTRICT NO. 3 ET AL., *ante*, p. 1007;

No. 93-7752. LYLE *v.* MCKEON, *ante*, p. 1008;

No. 93-7753. ROGERS *v.* NORTH CAROLINA, *ante*, p. 1008;

No. 93-7764. SHANTEAU *v.* DEPARTMENT OF SOCIAL SERVICES, *ante*, p. 1008;

No. 93-7767. IN RE MADSEN, *ante*, p. 1003;

No. 93-7783. ESTES *v.* VAN DER VEUR, WARDEN, *ante*, p. 1021;

No. 93-7844. FLYNN *v.* CITY OF GARDEN CITY, MICHIGAN, ET AL.; and FLYNN *v.* B&T TOWING, *ante*, p. 1010;

No. 93-7861. WRIGHT *v.* MARSHALL ET AL., *ante*, p. 1022;

No. 93-7867. SIMPSON *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 510 U. S. 1205;

No. 93-8045. BARTLETT *v.* VANCE, *ante*, p. 1040; and

No. 93-8058. IN RE SAMMONS, 510 U. S. 1190. Petitions for rehearing denied.

No. 93-6776. HICKS *v.* BALTIMORE GAS & ELECTRIC CO., 510 U. S. 1059; and

No. 93-7396. LAAN *v.* CALIFORNIA, 510 U. S. 1167. Motions for leave to file petitions for rehearing denied.

MAY 18, 1994

Dismissal Under Rule 46

No. 93-1170. UNITED STATES ET AL. *v.* NATIONAL TREASURY EMPLOYEES UNION ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1029.] Writ of certiorari as to Thomas C. Fishell dismissed under this Court's Rule 46.1.

MAY 23, 1994

Dismissal Under Rule 46

No. 93-8684. ROYAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 16 F. 3d 413.

Certiorari Granted—Vacated and Remanded. (See also No. 92-1113, *ante*, p. 659.)

No. 93-883. Interstate Commerce Commission et al. *v.* Overland Express, Inc. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Security Services, Inc.* v. *Kmart Corp.*, *ante*, p. 431. Justice Ginsburg took no part in the consideration or decision of this case. Reported below: 996 F. 2d 356.

No. 93-1129. Cotter & Co. *v.* Brizendine. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Security Services, Inc.* v. *Kmart Corp.*, *ante*, p. 431. Reported below: 4 F. 3d 457.

Certiorari Dismissed

No. 93-1563. Northbrook Property & Casualty Insurance Co. *v.* Edwards et al. C. A. 5th Cir. Motion of Northbrook Property Insurance Co. for leave to intervene denied. Motion of Northbrook Property Insurance Co. for leave to file a brief as *amicus curiae* in No. 93-1504, *Celotex Corp.* v. *Edwards et ux.* [certiorari granted, *infra*, p. 1105], granted. Certiorari dismissed. Reported below: 6 F. 3d 312.

Miscellaneous Orders

No. D-1336. In re Disbarment of Price. Disbarment entered. [For earlier order herein, see 510 U. S. 1022.]

No. D-1349. In re Disbarment of Cooper. Disbarment entered. [For earlier order herein, see 510 U. S. 1036.]

No. D-1359. In re Disbarment of Steinhorn. Disbarment entered. [For earlier order herein, see 510 U. S. 1104.]

No. D-1360. In re Disbarment of Provda. Disbarment entered. [For earlier order herein, see 510 U. S. 1105.]

No. D-1364. In re Disbarment of Herring. Disbarment entered. [For earlier order herein, see 510 U. S. 1105.]

No. D-1366. In re Disbarment of Stevens. Disbarment entered. [For earlier order herein, see 510 U. S. 1105.]

No. D-1372. In re Disbarment of Smith. Disbarment entered. [For earlier order herein, see 510 U. S. 1188.]

No. D-1376. In re Disbarment of Nath. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D-1391. In re Disbarment of Castro. It is ordered that William Castro, of Miami, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1392. In re Disbarment of Bledsoe. It is ordered that Carter Bledsoe, of McLean, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1393. In re Disbarment of Comici. It is ordered that Erio M. Comici, of Chesterfield, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1394. In re Disbarment of Farhat. It is ordered that Norman C. Farhat, of Farmington Hills, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1395. In re Disbarment of Moringiello. It is ordered that Lawrence D. Moringiello, of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1396. In re Disbarment of Cairo. It is ordered that Joseph G. Cairo, Jr., of Corona Village, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93-823. Nebraska Department of Revenue *v.* Loewenstein. Sup. Ct. Neb. [Certiorari granted, 510 U. S. 1176.] Motions of Federal Reserve Bank of New York and Council of State Governments et al. for leave to file briefs as *amici curiae* granted.

No. 93–1260. UNITED STATES *v.* LOPEZ. C. A. 5th Cir. [Certiorari granted, *ante,* p. 1029.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 93–1318. INTERSTATE COMMERCE COMMISSION *v.* TRANSCON LINES ET AL. C. A. 9th Cir. [Certiorari granted, *ante,* p. 1029.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 93–1341. WEST PENN POWER CO. ET AL. *v.* PENNSYLVANIA PUBLIC UTILITY COMMISSION ET AL. Sup. Ct. Pa. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 93–7745. JOHNSON *v.* JOHNSON. Super. Ct. N. J., App. Div. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante,* p. 1003] denied.

No. 93–8569. IN RE WHITAKER. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 13, 1994, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 93–8547. IN RE JAMES; and
No. 93–8616. IN RE BEAUMONT. Petitions for writs of mandamus denied.

Certiorari Granted

No. 93–1199. STONE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari granted. Reported below: 13 F. 3d 934.

No. 93–1525. LEBRON *v.* NATIONAL RAILROAD PASSENGER CORPORATION. C. A. 2d Cir. Certiorari granted. Reported below: 12 F. 3d 388.

No. 93–1504. CELOTEX CORP. *v.* EDWARDS ET UX. C. A. 5th Cir. Certiorari granted limited to the following question: "Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the nonbankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under § 105(a) of the Bankruptcy Code." Reported below: 6 F. 3d 312.

No. 93–1543. McKennon *v.* Nashville Banner Publishing Co. C. A. 6th Cir. Motion of American Association of Retired Persons et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 9 F. 3d 539.

Certiorari Denied

No. 93–683. Security Services, Inc., fka Riss International Corp. *v.* Garvey Corp. et al. C. A. 3d Cir. Certiorari denied.

No. 93–792. Silvey Refrigerated Carriers, Inc. *v.* H. J. Heinz Co. C. A. 3d Cir. Certiorari denied. Reported below: 6 F. 3d 780.

No. 93–1133. Town of Gray et al. *v.* Tri-State Rubbish, Inc., et al. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 632 A. 2d 134.

No. 93–1215. Mitchell Arms, Inc. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 7 F. 3d 212.

No. 93–1230. Schneider *v.* United States. Ct. Mil. App. Certiorari denied. Reported below: 38 M. J. 387.

No. 93–1265. Dougharty *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1073.

No. 93–1335. Security Services, Inc. *v.* John H. Harland Co. Ct. App. Ga. Certiorari denied. Reported below: 209 Ga. App. 175, 433 S. E. 2d 324.

No. 93–1403. Arthur et al. *v.* Bell Atlantic Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 12 F. 3d 204.

No. 93–1470. Metzger et al. *v.* Berhanu, Personal Representative of the Estate of Seraw, Deceased. Ct. App. Ore. Certiorari denied. Reported below: 119 Ore. App. 175, 850 P. 2d 373.

No. 93–1505. Tri-State Rubbish, Inc. *v.* City of Auburn, Maine, et al. Sup. Jud. Ct. Me. Certiorari denied.

No. 93–1508. MOSELEY ET UX. *v.* GEORGIA ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 263 Ga. 679, 436 S. E. 2d 632.

No. 93–1526. NELSON *v.* NELSON. Super. Ct. Ga., Gwinnett County. Certiorari denied.

No. 93–1527. ROGERS *v.* CITY OF INVERNESS, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–1528. CLARK *v.* BALTIMORE MUNICIPAL GOLF CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 10.

No. 93–1536. EJAY TRAVEL, INC., ET AL. *v.* ALGEMEEN BURGERLIJK PENSIOENFONDS. C. A. 3d Cir. Certiorari denied. Reported below: 12 F. 3d 1270.

No. 93–1537. KEHS ET AL. *v.* FOSTER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1227.

No. 93–1541. HALL *v.* HALL; and
No. 93–1542. CAMOSCIO *v.* HALL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 93–1545. RUSCITTI ET AL. *v.* FARMERS INSURANCE EXCHANGE. Ct. App. Colo. Certiorari denied.

No. 93–1546. RAY *v.* PEABODY INSTITUTE OF THE JOHNS HOPKINS UNIVERSITY CONSERVATORY OF MUSIC. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 31.

No. 93–1548. JOHNSON, INDIVIDUALLY AND AS CONSERVATOR OF THE ESTATE OF JOHNSON, AND AS NEXT BEST FRIEND OF JOHNSON, A MINOR *v.* METHODIST MEDICAL CENTER OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 10 F. 3d 1300.

No. 93–1549. COUNTY OF WESTCHESTER, NEW YORK *v.* COMMISSIONER OF TRANSPORTATION OF CONNECTICUT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 242.

No. 93–1553. BOYD *v.* GOOLSBY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 59.

No. 93–1557. LAMB *v.* UNION CARBIDE CORP. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 595.

No. 93–1558. SPRANGER *v.* RUNYON, POSTMASTER GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1089.

No. 93–1574. MCNARON *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1443.

No. 93–1580. KRUG *v.* AMBROSE, WILSON, GRIMM & DURAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1220.

No. 93–1590. HARPER *v.* HARPER. Ct. App. Ore. Certiorari denied. Reported below: 122 Ore. App. 9, 856 P. 2d 334.

No. 93–1600. EGB ASSOCIATES, INC., ET AL. *v.* TCBY SYSTEMS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 2 F. 3d 288.

No. 93–1601. BACHTEL ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1069.

No. 93–1605. ALLIED VAN LINES, INC. *v.* OBERG ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 11 F. 3d 679.

No. 93–1611. WHITMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF WHITMAN, DECEASED, ET AL. *v.* DONOGHUE, INDIVIDUALLY AND IN HIS CAPACITY AS COMMISSIONER OF PUBLIC WORKS FOR THE COUNTY OF BROOME, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1426.

No. 93–1616. GUZMAN *v.* HUDSON, DIRECTOR, UNITED STATES MARSHALS SERVICE. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 604.

No. 93–1641. DOE, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, DOE ET AL. *v.* TULLAHOMA CITY SCHOOLS BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 9 F. 3d 455.

No. 93–1646. FORESTWOOD FARMS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 3 F. 3d 443.

No. 93–1648. KAMIENSKI *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 93–1664. WILLIAMS ET AL. *v.* STEWART, PERSONAL REPRESENTATIVE OF THE ESTATE OF STEWART. Ct. Sp. App. Md. Certiorari denied. Reported below: 97 Md. App. 620, 631 A. 2d 517.

No. 93–1668. CROWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1109.

No. 93–1680. CONTRERAS-SUBIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 13 F. 3d 1341.

No. 93–1694. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 412.

No. 93–6253. ALLUM *v.* SECOND JUDICIAL DISTRICT COURT OF NEVADA ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 109 Nev. 1388, 875 P. 2d 1048.

No. 93–7583. BLACK *v.* COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 996 F. 2d 310.

No. 93–7699. KARIM-PANAHI *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 8 F. 3d 71.

No. 93–7826. GEERY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO. C. A. 9th Cir. Certiorari denied.

No. 93–7849. BARFIELD *v.* SECRETARY, NORTH CAROLINA DEPARTMENT OF CRIME CONTROL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 1140.

No. 93–7856. BENNETT *v.* BORG, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1083.

No. 93–7871. DUPARD *v.* JARVIS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 7 F. 3d 233.

No. 93–7935. KOWALCZYK *v.* THOMPSON, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 93–7979. LOWERY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–8006. MENA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8035. GOINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 441.

No. 93–8049. BALOG *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 402.

No. 93–8070. MIKHAIL *v.* RAILROAD RETIREMENT BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 538.

No. 93–8208. ISRAEL, AKA BRYANT *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 93–8255. STREETER *v.* ALABAMA. C. A. 11th Cir. Certiorari denied. Reported below: 15 F. 3d 1096.

No. 93–8295. WARREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 999 F. 2d 546.

No. 93–8299. STARKEY *v.* HENDERSON. C. A. 9th Cir. Certiorari denied.

No. 93–8428. CULP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 7 F. 3d 613.

No. 93–8474. SHERMAN *v.* COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 8 F. 3d 1160.

No. 93–8509. MURPHY *v.* COUNTY OF WESTCHESTER ET AL. C. A. 2d Cir. Certiorari denied.

No. 93–8512. MAXWELL *v.* ARVONIO. C. A. 3d Cir. Certiorari denied.

No. 93–8513. CASTRO LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8517. MEEKS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8527. RAY *v.* ERVIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93–8529. PRESSLEY *v.* MEDLOCK, ATTORNEY GENERAL OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93–8530. PAYNE *v.* ESCAMBIA COUNTY SHERIFF. C. A. 11th Cir. Certiorari denied.

No. 93–8532. MEDINA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8533. WILSON *v.* SANDERS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 53.

No. 93–8537. DRAPER *v.* GUNN ET AL. C. A. 9th Cir. Certiorari denied.

No. 93–8538. LUCERO *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8541. D'AMARIO *v.* O'NEIL, ATTORNEY GENERAL OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 93–8548. WILLIAMS *v.* SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 36.

No. 93–8560. FRANKLIN *v.* ENNIS POLICE DEPARTMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–8561. REYNOLDS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–8566. WALKER *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 10 F. 3d 1569.

No. 93–8567. TUCKER *v.* NINK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8568. TOY *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 93–8574. LEWIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 3 F. 3d 252.

No. 93–8584. DUKOVICH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 140.

No. 93–8588. EWELL ET AL. *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 11 F. 3d 482.

No. 93-8591. GIPSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93-8594. JORDAN *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 629 So. 2d 738.

No. 93-8595. KLEINSCHMIDT ET AL. *v.* LIBERTY MUTUAL INSURANCE CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 8 F. 3d 35.

No. 93-8598. MITCHELL *v.* OSBORNE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 595.

No. 93-8600. MACIEL *v.* GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 93-8602. RICHARDS *v.* BARTLETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 93-8605. GRECO, AKA GRIECO *v.* NELSON, SUPERINTENDENT, BAY STATE CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 93-8629. SLOAN *v.* ROBERTS ET AL. Sup. Ct. Va. Certiorari denied.

No. 93-8639. JEFFRESS *v.* BROWN, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 22 F. 3d 1106.

No. 93-8660. THOMPSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 93-8661. VOIGHT *v.* LEWIS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 544.

No. 93-8668. GRIFFITH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 93-8693. BRANHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 17 F. 3d 1436.

No. 93-8696. BARNUM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 181.

No. 93–8726. LeBlanc *v.* Shalala, Secretary of Health and Human Services. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

No. 93–8734. Rau *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 14 F. 3d 603.

No. 93–8763. Kaplan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8764. Forrest *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 17 F. 3d 916.

No. 93–8765. Kanu *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 22 F. 3d 1090.

No. 93–8773. Fiallo *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 93–8779. Atamantyk *v.* Department of Defense. C. A. Fed. Cir. Certiorari denied. Reported below: 17 F. 3d 1443.

No. 93–8781. Kelly *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 2 F. 3d 1157.

No. 93–8784. Colvin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 57.

No. 93–8786. McKay *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 21 F. 3d 1113.

No. 93–8790. Messer *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 59.

No. 93–8791. Lee *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 1079.

No. 93–8794. McQueen *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 58.

No. 93–8797. McKnight *v.* Iowa. Sup. Ct. Iowa. Certiorari denied. Reported below: 511 N. W. 2d 389.

No. 93–8806. Gholston *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 10 F. 3d 384.

No. 93–8808. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1558.

No. 93–8812. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8814. MARTINEZ DIAZ *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1431.

No. 93–8817. HANKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 14 F. 3d 57.

No. 93–8821. LEE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8826. SANCHEZ SANTANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 16 F. 3d 1231.

No. 93–8835. DRESSLER *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 180 Wis. 2d 468, 514 N. W. 2d 53.

No. 93–8845. PHELPS *v.* UNITED STATES FEDERAL GOVERNMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 15 F. 3d 735.

No. 93–8847. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 26 F. 3d 124.

No. 93–8850. DIZON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1091.

No. 93–8856. SALCEDO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1432.

No. 93–8857. BALL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 214.

No. 93–8862. GREGG *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1350.

No. 93–8863. FREDETTE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 15 F. 3d 272.

No. 93–8878. ANTHONY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 644.

No. 93–8888. PAGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8889. MENDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 19 F. 3d 15.

No. 93–8892. CAZARES-BARRAGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93–8904. HEILIG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 412.

No. 93–1533. PHILLIPS PETROLEUM CO. *v.* ROBERTSON OIL CO. C. A. 8th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 14 F. 3d 373.

No. 93–5893. WILLIAMSON *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 93–7957. BELTRAN-LOPEZ *v.* FLORIDA. Sup. Ct. Fla.;
No. 93–8089. TOWNS *v.* ILLINOIS. Sup. Ct. Ill.;
No. 93–8229. ARBELAEZ *v.* FLORIDA. Sup. Ct. Fla.; and
No. 93–8376. SAM *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: No. 93–5893, 852 P. 2d 167; No. 93–7957, 626 So. 2d 163; No. 93–8089, 157 Ill. 2d 90, 623 N. E. 2d 269; No. 93–8229, 626 So. 2d 169; No. 93–8376, 535 Pa. 350, 635 A. 2d 603.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

No. 93–6577. DAVIS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 504 N. W. 2d 767.

JUSTICE GINSBURG, concurring.

I write only to note that the dissent's portrayal of the opinion of the Minnesota Supreme Court is incomplete. That court made two key observations: (1) "[R]eligious affiliation (or lack thereof) is not as self-evident as race or gender," 504 N. W. 2d 767, 771 (Minn. 1993); (2) "Ordinarily . . . , inquiry on voir dire into a juror's religious affiliation and beliefs is irrelevant and prejudicial, and to ask such questions is improper," *id.*, at 772 (adding that "proper questioning . . . should be limited to asking jurors if they knew of any reason why they could not sit, if they would have any difficulty in following the law as given by the court, or if they would have any difficulty in sitting in judgment").

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

During jury selection for petitioner's trial on a charge of aggravated robbery, the prosecutor used a peremptory strike to remove a black man from the venire. Petitioner, who is black, objected on *Batson* grounds and requested a race-neutral explanation for the strike. See *Batson* v. *Kentucky,* 476 U. S. 79, 97 (1986). The prosecutor responded that she had struck the venireman because he was a Jehovah's Witness and explained that "[i]n my experience Jahovah Witness [sic] are reluctant to exercise authority over their fellow human beings in this Court House." 504 N. W. 2d 767, 768 (Minn. 1993). The trial court accepted that reason for the strike and proceeded to trial. Petitioner subsequently was convicted.

On appeal, petitioner conceded that the prosecutor's explanation for the strike was race neutral, but contended that *Batson* should be extended to prohibit peremptory strikes based on religion. The Supreme Court of Minnesota rejected petitioner's *Batson* argument and affirmed the conviction. The court reasoned that this Court has never held that "*Batson* should extend beyond race-based peremptory challenges," and noted that "*Batson,* itself, speaks solely of the need to eradicate racial discrimination." *Ibid.* Acknowledging that "[i]f the life of the law were logic rather than experience, *Batson* might well be extended to include religious bias and, for that matter, an endless number of other biases," *id.*, at 769, the court nevertheless concluded that, because *Batson* had been confined by this Court to the context of race, it should not be broadened to reach petitioner's claim in this case, 504 N. W. 2d, at 772.

I find it difficult to understand how the Court concludes today that the judgment of the court below should not be vacated and the case remanded in light of our recent decision in *J. E. B.* v. *Alabama ex rel. T. B., ante,* p. 127, which shatters the Supreme Court of Minnesota's understanding that *Batson*'s equal protection analysis applies solely to racially based peremptory strikes. It is abundantly clear that the lower court was relying on just such a reading of *Batson,* for it reasoned that *Batson* embodies "'a special rule of relevance'" that operates only in the context of race, and concluded that "'[o]utside the uniquely sensitive area of race the ordinary rule that a prosecutor may strike without giving any reason applies.'" 504 N. W. 2d, at 771–772 (quoting *Brown* v. *North Carolina,* 479 U. S. 940, 942 (1986) (O'CONNOR, J., concurring in denial of certiorari)). In extending Equal Protection Clause analysis to prohibit strikes exercised on the basis of sex, *J. E. B.* explicitly disavowed that understanding of *Batson.*

Indeed, given the Court's rationale in *J. E. B.,* no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause. The Court's decision in *J. E. B.* was explicitly grounded on a conclusion that peremptory strikes based on sex cannot survive "heightened scrutiny" under the Clause, *ante,* at 135, because such strikes "are not substantially related to an important government objective," *ante,* at 137, n. 6. In breaking the barrier between classifications that merit strict equal protection scrutiny and those that receive what we have termed "heightened" or "intermediate" scrutiny, *J. E. B.* would seem to have extended *Batson*'s equal protection analysis to all strikes based on the latter category of classifications—a category which presumably would include classifications based on religion. Cf. *Larson* v. *Valente,* 456 U. S. 228, 244–246 (1982); *Batson, supra,* at 124 (Burger, C. J., dissenting). It is at least not obvious, given the reasoning in *J. E. B.,* why peremptory strikes based on religious affiliation would survive equal protection analysis. As JUSTICE SCALIA pointed out in dissent, *J. E. B.* itself provided no rationale for distinguishing between strikes exercised on the basis of various classifications that receive heightened scrutiny, *ante,* at 161, and the Supreme Court of Minnesota certainly did not develop such a distinction. As described above, the court relied expressly on the understanding that *Batson* was confined to the context of race. Under these circumstances, this case should be remanded for the Supreme Court of Minnesota to consider explicitly whether a principled basis exists for confining the holding in *J. E. B.* to the context of sex.

I can only conclude that the Court's decision to deny certiorari stems from an unwillingness to confront forthrightly the ramifications of the decision in *J. E. B.* It has long been recognized by some Members of the Court that subjecting the peremptory strike to the rigors of equal protection analysis may ultimately spell the doom of the strike altogether, because the peremptory challenge is by nature "'"an arbitrary and capricious right."'" *Batson, supra,* at 123 (Burger, C. J., dissenting) (quoting *Swain* v. *Alabama,* 380 U. S. 202, 219 (1965) (quoting *Lewis* v. *United States,* 146 U. S. 370, 378 (1892))). Cf. *J. E. B., ante,* at 161–162 (SCALIA, J., dissenting). Once the scope of the logic in *J. E. B.* is honestly acknowledged, it cannot be glibly asserted that the decision has no implications for peremptory strikes based on classifications other than sex, or that it does not imply further restrictions on the exercise of the peremptory strike outside the context of race and sex.

In my view, the petition should therefore be granted, the judgment below vacated, and the case remanded for reconsideration in light of *J. E. B.* I respectfully dissent.

Rehearing Denied

No. 93–6630. MURPHY *v.* UNITED STATES, *ante,* p. 1019;

No. 93–7108. SEMIEN *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, 510 U. S. 1198;

No. 93–7696. GANT *v.* UNITED STATES, 510 U. S. 1183;

No. 93–7813. ADAMS *v.* UNITED STATES, *ante,* p. 1021;

No. 93–7820. WATSON *v.* MORRIS ET AL., *ante,* p. 1021;

No. 93–7892. STEEL *v.* WACHTLER ET AL., *ante,* p. 1023; and

No. 93–7948. KENNEDY *v.* SCOTT, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, *ante,* p. 1038. Petitions for rehearing denied.

No. 93–423. KATSIS *v.* IMMIGRATION AND NATURALIZATION SERVICE, 510 U. S. 1081; and

No. 93–7501. MALDONADO *v.* UNITED STATES, 510 U. S. 1138. Motions for leave to file petitions for rehearing denied.

No. 93–7002. CAMPBELL *v.* WOOD, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, ET AL., 510 U. S. 1215. Petition for rehearing denied. JUSTICE BLACKMUN dissents from the denial of rehearing. He would grant the petition for rehearing, grant the petition for certiorari, and vacate petitioner's death sentence. See *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994).

May 26, 1994

Certiorari Denied

No. 93–8931 (A–901). Campbell *v.* Wood, Superintendent, Washington State Penitentiary, et al. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to Justice O'Connor, and by her referred to the Court, denied. Certiorari denied. Justice Stevens and Justice Ginsburg would grant the application for stay of execution of sentence of death. Reported below: 18 F. 3d 662.

Justice Blackmun, dissenting.

In 1853, hanging was the "nearly universal form of execution" in the United States, *State* v. *Frampton,* 95 Wash. 2d 469, 492, 627 P. 2d 922, 934 (1981), and 48 States once imposed death by this method. Today, only Washington and Montana still employ judicial hanging. Montana has not executed anyone by hanging in over 50 years, and no one who has contested the sentence has been lawfully hanged in the United States in more than three decades.[1] Petitioner Charles Rodman Campbell, who is scheduled to be executed "by hanging by the neck" in Washington this week,[2] contends that his hanging will constitute a cruel and unusual punishment. I agree, and accordingly, even if I believed that the death penalty could be applied constitutionally, see *Callins* v. *Collins,* 510 U. S. 1141, 1143 (1994) (Blackmun, J., dissenting), I would vote to grant the application for stay and the petition for certiorari in this case.[3]

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[1] The only execution by hanging to occur since 1963 was that of Westley Alan Dodd, who was executed in Washington last year. Dodd refused either to select his mode of punishment or to challenge his hanging sentence.

[2] Washington's death penalty statute, Wash. Rev. Code 10.95.180(1) (1992), provides: "The punishment of death . . . shall be inflicted either by hanging by the neck or, at the election of the defendant, by [lethal injection]." For defendants like Campbell who are unwilling to select their mode of execution, Washington imposes death by hanging.

[3] Possible obstacles to review are the facts that petitioner's habeas claim might constitute a new rule under *Teague* v. *Lane,* 489 U. S. 288 (1989) (plurality opinion), and that no circuit conflict exists regarding whether hanging is cruel and unusual. Because the only two States that retain hanging are in the Ninth Circuit, a circuit conflict on this issue is unlikely to emerge. Though I respect that Members of this Court may disagree, I would not await a conflict in a capital case raising a fundamental constitutional question such as this.

This Court has accepted that the Eighth Amendment's prohibition against cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (plurality opinion), and that the best evidence of these evolving standards "is the legislation enacted by the country's legislatures," *Penry* v. *Lynaugh*, 492 U. S. 302, 331 (1989); see also *Stanford* v. *Kentucky*, 492 U. S. 361, 370 (1989) (citations omitted) ("'[F]irst' among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives"); *Ford* v. *Wainwright*, 477 U. S. 399, 408–410 (1986). The public condemnation of hanging is overwhelming. Not only have 46 of the 48 States that once regularly imposed hanging abandoned the practice, but many state legislatures rejected the practice because it was perceived as inhumane and barbaric, precisely the concern that lies at the core of the Eighth Amendment. See, *e. g.*, *Furman* v. *Georgia*, 408 U. S. 238, 296–297 (1972) (Brennan, J., concurring) ("Since the development of the supposedly more humane methods" of lethal gas and electrocution, "hanging and shooting have virtually ceased"); *Malloy* v. *South Carolina*, 237 U. S. 180, 185 (1915) (noting that 11 States altered their practice based on "a well-grounded belief that electrocution is less painful and more humane than hanging"). But see *Glass* v. *Louisiana*, 471 U. S. 1080 (1985) (Brennan, J., dissenting) (arguing that death by electrocution is cruel and unusual). Even as the death penalty's popularity has increased in recent years, toleration for hanging has steadily declined. Of the eight States that provided for judicial hanging by the time of the *Furman* decision, see 408 U. S., at 297, n. 50 (Brennan, J., concurring), all but two have abolished it. Today, the only three jurisdictions in the English-speaking world that impose state-sponsored hangings are Washington, Montana, and South Africa.[4] App. to Pet. for Cert. A–38.

Moreover, the States' rejection of hanging has been much more universal than that of practices this Court previously has found to be cruel and unusual. Compare *Thompson* v. *Oklahoma*, 487

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[4] Hanging in South Africa also soon may be a thing of the past. Former President F. W. de Klerk imposed a moratorium on hanging in South Africa in 1990, and no one has been executed in that country since 1989. The African National Congress has campaigned to abolish the death penalty. See N. Y. Times, Apr. 27, 1994, section A, p. 9, col. 1.

U. S. 815 (1988) (invalidating capital punishment for offenders under age 16 where almost two-thirds of state legislatures rejected the practice); *Enmund* v. *Florida*, 458 U. S. 782 (1982) (striking down the death penalty for vicarious felony murders where only eight States still authorized the punishment); *Coker* v. *Georgia*, 433 U. S. 584, 595–596 (1977) (abolishing the death penalty for rape where only Georgia imposed death for rape of an adult and only three States imposed the penalty for any rape), with *Stanford* v. *Kentucky*, 492 U. S., at 371 (upholding the death penalty for 16-year-olds since "a majority of the States that permit capital punishment authorize" the practice). If the Eighth Amendment represents anything other than a prohibition against punishments that have been entirely abolished, a punishment once universally practiced and then abandoned *specifically due to its inhumanity* must qualify as cruel and unusual.

In a 6-to-5 en banc opinion, the Court of Appeals for the Ninth Circuit disregarded this overwhelming evidence of state practice, holding that such evidence is relevant to consideration only of the *proportionality* of a death sentence. Where the *method* of execution is contested, the majority reasoned, the Eighth Amendment prohibits only "the unnecessary and wanton infliction of pain." App. to Pet. for Cert. A–20. Because hanging does not inflict "purposeful cruelty," the method is constitutional. *Id.*, at A–25. The Ninth Circuit's analysis is surprising given that this Court never has held that pain is the exclusive consideration under the Eighth Amendment, nor distinguished between challenges to the proportionality and the method of capital punishment. To the contrary, we have suggested that "[a] penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment,'" *Gregg* v. *Georgia*, 428 U. S. 153, 173 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), a suggestion supported by our recognition that *painless*, post mortem punishments such as public display, drawing and quartering, and mutilation also violate the Eighth Amendment. *Wilkerson* v. *Utah*, 99 U. S. 130, 135–136 (1879).

But the en banc panel's emphasis on pain also fails on its own terms. Under the most "ideal" of circumstances, hanging kills by breaking the spine. "When the victim is dropped from a sufficient height his vertebrae are dislocated and his spinal cord crushed; unconsciousness is immediate and death follows a short time later." App. to Pet. for Cert. A–49 (Reinhardt, J., dissenting), quoting Gardner, Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment, 39 Ohio St. L. J. 96, 120 (1978). Hanging, however, is a crude and imprecise practice, which always includes a risk that the inmate will slowly strangulate or asphyxiate, if the rope is too elastic or too short, or will be decapitated, if the rope is too taut or too long. A veteran prison warden has described a typical hanging:

> "When the trap springs he dangles at the end of the rope. There are times when the neck has not been broken and the prisoner strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken, and the rope many times takes large portions of skin and flesh from the side of the face that the noose is on. He urinates, he defecates, and droppings fall to the floor while witnesses look on." App. to Pet. for Cert. A–57 (Reinhardt, J., dissenting), quoting Gardner, 39 Ohio St. L. J., at 121.

A person who slowly asphyxiates or strangulates while twisting at the end of a rope unquestionably experiences the most torturous and "wanton infliction of pain," *Gregg* v. *Georgia*, 428 U. S., at 173 (joint opinion of Stewart, Powell, and STEVENS, JJ.), while partial or complete decapitation of the person, as blood sprays uncontrollably, obviously violates human dignity.

Washington contends that by conducting its hangings pursuant to its Field Instruction WSP 410.500 or "protocol," these misfortunes can be reduced. Washington's protocol details the appropriate placement of the noose knot and the width and length of the rope to avoid decapitation, and provides that the rope be boiled, stretched, and waxed to reduce asphyxiation. The protocol includes a chart for determining, based on the weight of the defendant, the appropriate distance the body should be dropped. Washington relies entirely on this protocol in conducting its judicial hangings; the State employs no "trained hangers," nor, apparently, are there any persons so trained in the United States. App. to Pet. for Cert. A–26.

The Ninth Circuit relied on this protocol and the State's own evidence from its sole recent hanging to find only a "slight risk" that death by hanging will not be rapid or comparatively painless. *Id.*, at A–25. Washington's protocol, however, is derived almost verbatim from a 1959 military execution manual that never has been used in any hanging, and that is almost indistinguishable from hanging procedures that resulted in torturous deaths and mutilations in the past. See *id.*, at A–50, and n. 31 (Reinhardt, J., dissenting). Experts for both parties who testified before the District Court agreed that hanging always includes a risk that unconsciousness and death will not be instantaneous, and admitted that a certain number of Washington's hangings inevitably will result in death by decapitation. The State presented no evidence that Washington's protocol will significantly reduce the risk of asphyxiation or decapitation, and Campbell introduced unrefuted testimony that the protocol actually may increase the likelihood that an inmate's head will be torn off. The evidence in the record is uncontested, therefore, that Washington's hangings will suffer the inevitable failings that led all but one other State to abandon hanging as a means of execution.

I do not dispute that petitioner's crime was horrible or that his punishment should be severe. It is equally irrefutable, however, that the Constitution prohibits the imposition of punishments that are offensive to civilized society. Forty-six of the forty-eight States that once imposed hanging have rejected that punishment as unnecessarily torturous, brutal, and inhumane. I can only conclude that today in the United States of America, hanging is cruel and unusual punishment. I dissent.

No. 93–9278 (A–977). NETHERY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant the application for stay of execution and the petition for certiorari and would vacate the death sentence in this case.

MAY 31, 1994

Certiorari Granted—Vacated and Remanded

No. 92–1799. VISITING HOMEMAKER & HEALTH SERVICES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir.

Certiorari granted, judgment vacated, and case remanded for further consideration in light of *NLRB* v. *Health Care & Retirement Corp. of America, ante,* p. 571. Reported below: 989 F. 2d 490.

No. 93–1079. UNITED STATES *v.* PRICE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Custis* v. *United States, ante,* p. 485. Reported below: 999 F. 2d 545.

No. 93–6045. STARKES *v.* UNITED STATES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Staples* v. *United States, ante,* p. 600. Reported below: 995 F. 2d 1065.

No. 93–7816. ROSS *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Staples* v. *United States, ante,* p. 600. Reported below: 9 F. 3d 1182.

Vacated and Remanded After Certiorari Granted

No. 93–892. NTA GRAPHICS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. [Certiorari granted, 510 U. S. 1162.] Motion of the Solicitor General to vacate and remand granted. Judgment vacated as moot, and case remanded to the Court of Appeals with instructions to remand the case to the National Labor Relations Board to vacate the Board's order in case No. 8–CA–24277 and to vacate the certification of the Union on which that order was based. See *United States* v. *Munsingwear, Inc.,* 340 U. S. 36, 39–40 (1950); *A. L. Mechling Barge Lines, Inc.* v. *United States,* 368 U. S. 324, 329–331 (1961); *Board of Governors, FRS* v. *Security Bancorp,* 454 U. S. 1118 (1981).

Miscellaneous Orders

No. — — —. DAVID *v.* HUDACS, COMMISSIONER OF LABOR OF NEW YORK. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. — — —. EDMOND *v.* CONSUMER PROTECTION DIVISION. Motion to direct the Clerk to file petition for writ of certiorari with an appendix that does not comply with the Rules of this Court denied.

No. A-906. California *v.* Pimentel. Ct. App. Cal., 4th App. Dist. Application for stay of enforcement of judgment, addressed to Justice Scalia and referred to the Court, denied.

No. D-1094. In re Disbarment of Feige. Disbarment entered. [For earlier order herein, see 503 U. S. 932.]

No. D-1374. In re Disbarment of Heitmann. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D-1377. In re Disbarment of Spence. Disbarment entered. [For earlier order herein, see *ante*, p. 1015.]

No. D-1378. In re Disbarment of Wade. Disbarment entered. [For earlier order herein, see *ante*, p. 1015.]

No. D-1387. In re Disbarment of Chapman. Disbarment entered. [For earlier order herein, see *ante*, p. 1028.]

No. D-1397. In re Disbarment of Cloutier. It is ordered that Edward H. Cloutier, of Livermore Falls, Me., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93-1353. United States *v.* Simpson et al. C. A. 9th Cir. Motions of respondents Molina and Simpson for leave to proceed *in forma pauperis* granted.

No. 93-7927. Kyles *v.* Whitley, Warden. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1051.] Motion for appointment of counsel granted, and it is ordered that George W. Healy III, Esq., of New Orleans, La., be appointed to serve as counsel for petitioner in this case.

No. 93-8621. McDonald *v.* New Mexico et al. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. See this Court's Rule 39.8. Petitioner is allowed until June 21, 1994, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

No. 93-9011. In re Hamilton; and

No. 93-9015. In re Hunwardsen. Petitions for writs of habeas corpus denied.

No. 93-1647. In re Voinovich, Governor of Ohio, et al.; and

No. 93-8212. In re Presley. Petitions for writs of mandamus denied.

Certiorari Granted

No. 93-1660. Arizona *v.* Evans. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* without an affidavit of indigency executed by respondent granted. Certiorari granted. Reported below: 177 Ariz. 201, 866 P. 2d 869.

Certiorari Denied

No. 93-1196. De Maio *v.* Brown et al. Cir. Ct. Baltimore County, Md. Certiorari denied.

No. 93-1307. Kansas Public Employees Retirement System *v.* Reimer & Koger Associates, Inc., et al. C. A. 8th Cir. Certiorari denied. Reported below: 4 F. 3d 614.

No. 93-1365. Sammett Corp. *v.* Key Enterprises of Delaware, Inc. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 893.

No. 93-1384. Downtown Frankfort, Inc., et al. *v.* Capital Area Right to Life, Inc. Sup. Ct. Ky. Certiorari denied. Reported below: 862 S. W. 2d 297.

No. 93-1405. Parlavecchio *v.* United States (two cases). C. A. 3d Cir. Certiorari denied.

No. 93-1407. Pearson *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 8 F. 3d 631.

No. 93-1436. Henry, Individually and on Behalf of Chanry Communications, Ltd. *v.* Wetzler, Commissioner, New York State Department of Taxation and Finance, et al. Ct. App. N. Y. Certiorari denied. Reported below: 82 N. Y. 2d 859, 631 N. E. 2d 102.

No. 93-1455. Hayes, as Administrator, Parent, and Next Friend of Hayes, Deceased, et al. *v.* Douglas Dynamics, Inc. C. A. 1st Cir. Certiorari denied. Reported below: 8 F. 3d 88.

No. 93–1473. Ternes *v.* Berchard, fka Ternes, et al. C. A. 9th Cir. Certiorari denied.

No. 93–1532. Cox *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1543.

No. 93–1556. Karatinos et al. *v.* Town of Juno Beach, Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 621 So. 2d 469.

No. 93–1561. Collins et al. *v.* Thompson et al. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 657.

No. 93–1565. Louisiana Department of Transportation and Development *v.* Wiedeman et al. Sup. Ct. La. Certiorari denied. Reported below: 627 So. 2d 170.

No. 93–1566. Weaver *v.* California et al. C. A. 9th Cir. Certiorari denied.

No. 93–1567. A. J. Industries, Inc. *v.* Hedges et al. Sup. Ct. Vt. Certiorari denied. Reported below: 161 Vt. 614, 640 A. 2d 536.

No. 93–1568. Silstar Corporation of America, Inc. *v.* Shakespeare, Inc. C. A. 4th Cir. Certiorari denied. Reported below: 9 F. 3d 1091.

No. 93–1571. Qutb, Individually and as Next Friend of Qutb, et al. *v.* Bartlett, Mayor of the City of Dallas, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 488.

No. 93–1573. Chamness et ux. *v.* Federal Deposit Insurance Corporation et al. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1546.

No. 93–1579. Vaughan *v.* First National Bank of Shamrock, Texas, et al. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 408.

No. 93–1581. City of Seattle et al. *v.* Bascomb et al. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1550.

No. 93–1583. Texas Commerce Bancshares, Inc. *v.* Grossman. C. A. 2d Cir. Certiorari denied.

No. 93–1585. Anonsen et al. *v.* Donahue et al. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 857 S. W. 2d 700.

No. 93–1586. International Woodworkers of America, U. S., AFL–CIO, et al. *v.* Weyerhaeuser Co. C. A. 8th Cir. Certiorari denied. Reported below: 7 F. 3d 133.

No. 93–1589. Sears, Roebuck & Co. et al. *v.* Harris, Administratrix of the Estate of Simpson, Deceased, et al. Sup. Ct. Ala. Certiorari denied. Reported below: 630 So. 2d 1018.

No. 93–1593. Hillary *v.* Trans World Airlines, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 180.

No. 93–1594. Golden Valley Microwave Foods, Inc. *v.* Weaver Popcorn Co., Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1072.

No. 93–1598. Steele *v.* State Bar of Montana. Sup. Ct. Mont. Certiorari denied. Reported below: 262 Mont. 481, 865 P. 2d 285.

No. 93–1607. Brothers *v.* Brothers et al. Ct. Civ. App. Ala. Certiorari denied. Reported below: 628 So. 2d 776.

No. 93–1614. Hughes *v.* Norfolk & Western Railway Co. Sup. Ct. Va. Certiorari denied. Reported below: 247 Va. 113, 439 S. E. 2d 411.

No. 93–1618. Graham et al. *v.* Butterworth, Attorney General of Florida, et al. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 496.

No. 93–1619. Broyde et al. *v.* Gotham Tower, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 13 F. 3d 994.

No. 93–1653. Miller *v.* Arkansas. Ct. App. Ark. Certiorari denied. Reported below: 44 Ark. App. 112, 868 S. W. 2d 510.

No. 93–1658. Gilbert-Bey *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93–1693. Employers Underwriters, Inc., et al. *v.* Weaver et ux. C. A. 5th Cir. Certiorari denied. Reported below: 13 F. 3d 172.

No. 93–1699. Buracker, Sheriff, as Successor in Interest to Thompson, Administrator to the Estate of Nickelson, Deceased *v.* Wilt et ux. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 191 W. Va. 39, 443 S. E. 2d 196.

No. 93–1701. Davies *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93–1706. Crosetto et al. *v.* State Bar of Wisconsin et al. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 1396.

No. 93–1712. Johnson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 168.

No. 93–1718. Uberoi *v.* University of Colorado et al. Ct. App. Colo. Certiorari denied.

No. 93–1721. Cobb County, Georgia *v.* Harvey et al. C. A. 11th Cir. Certiorari denied. Reported below: 15 F. 3d 1097.

No. 93–1725. Gonzalez-Balderas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 1218.

No. 93–1727. Fassnacht *v.* City of Philadelphia. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1429.

No. 93–1730. Miccio *v.* New Jersey Department of Community Affairs et al. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 48.

No. 93–1731. Smith *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 407.

No. 93–1733. Jones *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93–5464. Roman *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 989 F. 2d 1117.

No. 93–5562. Watt *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 996 F. 2d 1218.

No. 93–5570. ELLIOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 992 F. 2d 853.

No. 93–6321. DAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 998 F. 2d 622.

No. 93–6385. BYRD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 995 F. 2d 536.

No. 93–6448. BRADSHAW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 999 F. 2d 798.

No. 93–6495. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 1 F. 3d 1234.

No. 93–6600. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 1 F. 3d 1234.

No. 93–7213. VALENZUELA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 1495.

No. 93–7234. TREVIZO-ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 5 F. 3d 1494.

No. 93–7514. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 8 F. 3d 23.

No. 93–7654. DUPONT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 2 F. 3d 723.

No. 93–7851. GAY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 7 F. 3d 200.

No. 93–7881. EDSALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 166.

No. 93–7936. SMITH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 14 F. 3d 50.

No. 93–8027. NAVARETTE-AVENDANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1110.

No. 93–8153. WILSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 11 F. 3d 346.

No. 93–8175. RIVAS-GAYTAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 104.

No. 93-8188. RUSSELL *v.* SHAKER HEIGHTS MUNICIPAL COURT ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 67 Ohio St. 3d 1464, 619 N. E. 2d 698.

No. 93-8210. NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 6 F. 3d 1049.

No. 93-8276. DINGLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 8 F. 3d 71.

No. 93-8319. MIDDLETON *v.* LOCKHART ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 863 S. W. 2d 367.

No. 93-8431. ALMODOVAR *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 196 App. Div. 2d 718, 601 N. Y. S. 2d 914.

No. 93-8466. WEBBER *v.* VANDREW ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8577. POTILLOR *v.* ESTELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1108.

No. 93-8578. MERRIWEATHER *v.* MITCHELL, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 93-8601. MAKIN *v.* COLORADO TERRITORIAL CORRECTIONAL FACILITY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 406.

No. 93-8603. HAMANI, AKA CLEMONS *v.* MORTON, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93-8612. GODIN *v.* NEW YORK. County Ct., Jefferson County, N. Y. Certiorari denied.

No. 93-8613. TOWNLEY *v.* JONES, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 93-8619. LANGE *v.* HEITKAMP ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1227.

No. 93-8624. WILLIAMS *v.* HAWLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 93–8628. Taveras *v.* New York Department of Correctional Services et al. C. A. 2d Cir. Certiorari denied.

No. 93–8630. Sloan *v.* Guillory, Warden. Sup. Ct. Va. Certiorari denied.

No. 93–8634. Streeter *v.* Burton, Warden. C. A. 11th Cir. Certiorari denied. Reported below: 9 F. 3d 1559.

No. 93–8635. Hollawell *v.* Stepanik, Superintendent, Pennsylvania State Correctional Institution at Dallas, et al. C. A. 3d Cir. Certiorari denied.

No. 93–8641. Johnson, aka Razi-Bey *v.* Mann, Superintendent, Shawangunk Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 93–8646. Trujillo-Garcia *v.* Rowland, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1553.

No. 93–8650. Thandiwe *v.* Compton, Warden, et al. C. A. 6th Cir. Certiorari denied.

No. 93–8651. Thandiwe *v.* Strahan et al. Sup. Ct. Tenn. Certiorari denied.

No. 93–8657. Doctor *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 431 Pa. Super. 637, 631 A. 2d 1366.

No. 93–8659. Bain *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 630 So. 2d 194.

No. 93–8662. Witt *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8664. Burnett *v.* Fairley et al. C. A. 8th Cir. Certiorari denied.

No. 93–8669. Hodge *v.* Idaho. Ct. App. Idaho. Certiorari denied. Reported below: 124 Idaho 927, 866 P. 2d 184.

No. 93–8670. Gonzalez *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1425.

No. 93–8671. Flowers *v.* Gudmanson, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 9 F. 3d 1549.

No. 93–8673. Hill et al. *v.* California. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8694. Cotner *v.* Cody, Warden, et al. C. A. 10th Cir. Certiorari denied.

No. 93–8695. Carpenter et ux. *v.* Blankenship. Cir. Ct. Calhoun County, W. Va. Certiorari denied.

No. 93–8699. King *v.* Texas. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 93–8701. Hett *v.* Madison Mutual Insurance Co., Inc., et al. Sup. Ct. Fla. Certiorari denied. Reported below: 632 So. 2d 1026.

No. 93–8702. Esnault *v.* Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 415.

No. 93–8703. Gomez *v.* Gomez, Director, California Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 394.

No. 93–8715. Desmond *v.* Haldane et al. App. Ct. Mass. Certiorari denied. Reported below: 36 Mass. App. 1104, 629 N. E. 2d 1016.

No. 93–8718. Fromal *v.* Robins et al. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 594.

No. 93–8725. Choudhary *v.* Vermont Department of Public Service et al. C. A. 2d Cir. Certiorari denied. Reported below: 9 F. 3d 1538.

No. 93–8767. Green *v.* Kuhlmann, Superintendent, Sullivan Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1427.

No. 93–8774. Ayrs *v.* Prudential-LMI et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8782. Espinal *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 1426.

No. 93–8804. Martin *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 93–8809. McFail *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 18 F. 3d 954.

No. 93–8841. Munoz *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 395.

No. 93–8844. Munir *v.* Scott et al. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 213.

No. 93–8869. Freeman *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 406.

No. 93–8872. Zack *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 12 F. 3d 215.

No. 93–8880. Alvarez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 1078.

No. 93–8881. Cardenas *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 9 F. 3d 1139.

No. 93–8882. Armenta-Lopez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 30.

No. 93–8884. Mahn *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 202.

No. 93–8887. Rodreiquez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 16 F. 3d 1229.

No. 93–8895. Clay *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 1430.

No. 93–8896. Smith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 13 F. 3d 860.

No. 93–8897. Wilson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 7 F. 3d 828.

No. 93–8901. Grote *v.* Copeland, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 26.

No. 93–8905. Montes-Mercado *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 541.

No. 93–8908. Richmond *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1432.

No. 93–8912. BANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 1098.

No. 93–8913. BARRERO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 19 F. 3d 1446.

No. 93–8915. CARPENTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93–8920. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 412.

No. 93–8928. BYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8930. COLELLO ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 16 F. 3d 193.

No. 93–9027. CONN *v.* WELLS. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1218.

No. 93–1201. CAPITAL AREA RIGHT TO LIFE, INC. *v.* DOWNTOWN FRANKFORT, INC., ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 862 S. W. 2d 297.

JUSTICE O'CONNOR, dissenting.

Each year, Downtown Frankfort, Inc. (DFI), a nonprofit corporation established to promote downtown revitalization in Frankfort, Kentucky, organizes a 1-day "Great Pumpkin Festival" on the city's St. Clair Mall. Capital Area Right to Life, Inc. (CARTL), had a booth at the 1989 festival, where it, among other things, distributed plastic models of fetuses in little baskets. When many festivalgoers objected to this sort of political advocacy at the festival, DFI adopted a policy of denying booths to organizations that it deemed incompatible with the festival's goals of "fun and entertainment." Under this policy, DFI refused to give CARTL a booth at the 1990 festival; DFI's president explicitly told CARTL representatives that this was because CARTL was a "controversial group." DFI also denied booths to Kentucky NOW and the Kentucky Religious Coalition for Abortion Rights, two political groups with a message opposed to that of CARTL. 862 S. W. 2d 297, 297–298 (Ky. 1993).

CARTL sued, claiming the policy violated its free speech rights. The Kentucky Supreme Court disagreed. It concluded DFI was a state actor, and thus subject to the strictures of the First Amendment, because (1) DFI is principally funded by state agencies, (2) DFI took over from the city the function of promoting downtown revitalization, and (3) the city temporarily delegated to DFI control over the St. Clair Mall by letting DFI conduct the festival and decide who gets booths. *Id.*, at 299–300. But the court went on to hold that the festival's policy was nonetheless "content neutral," and therefore a valid time, place, and manner restriction. *Id.*, at 300–301. The court interpreted the content-neutrality requirement as meaning that the restriction must be "neutral as to the type of message the restriction permits as well as being nondiscriminatory between messages of the same type, so long as there is a logical and legitimate reason for restricting the type of message." *Id.*, at 301. "It is a critical fact in this case," the court said, "that CARTL's counterparts, NOW and the Religious Coalition for Abortion Rights, were also denied booths in keeping with the festival's theme." *Ibid.*

This content-neutrality analysis is flatly inconsistent with our precedents. The restriction here is clearly not content neutral, and therefore cannot be a permissible time, place, and manner restriction, because it is indisputably justified with reference to the controversial content of the speech. See, *e. g., Boos* v. *Barry*, 485 U. S. 312, 321 (1988). The fact that prochoice speakers were treated similarly under this regulation does not dispose of the content-neutrality analysis; we have time and again rejected the argument that viewpoint neutrality equals content neutrality. See, *e. g., Burson* v. *Freeman*, 504 U. S. 191, 197 (1992); *Boos, supra*, at 319; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987); *Consolidated Edison Co. of N. Y.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 530, 537–538 (1980); *Carey* v. *Brown*, 447 U. S. 455, 462, n. 6 (1980).

In fact, *Heffron* v. *International Soc. for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), the case on which the opinion below relied, specifically said that, to be a valid time, place, and manner restriction, a regulation "'may not be based upon either the content *or subject matter* of speech,'" *id.*, at 648 (emphasis added). Perhaps there is some other reason why the restriction might be permissible; but to call it content neutral and to uphold it on that basis is a serious error and an unfortunate precedent.

I also think the Kentucky Supreme Court's state action analysis raises an important and difficult question. Many private organizations—artists' groups, private hospitals, private universities, organizations that educate the public on social matters, Presidential campaigns—get government subsidies. We have made clear that a state subsidy of a private organization, even a private organization that exercises functions which might otherwise be performed by the State, does not make that organization a state actor for First Amendment purposes. *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 840–843 (1982) (dealing with a First Amendment claim based on the discharge of an employee by a private school for maladjusted high school students). That this case also involves the use of a traditional public forum probably should not change the analysis. Many of the groups mentioned above may put on events in public fora, and it is not clear that they should have any less right to exclude people from their events than any other public forum user would have to exclude others from its rally or parade.

We have recently granted certiorari in *Lebron* v. *National Railroad Passenger Corporation*, 511 U. S. 1105 (1994), to resolve a related state action question. While we cannot now tell to what extent the decision in *Lebron* may bear on this case, I would hold this case pending that decision, and then either grant and remand in light of *Lebron*, or, if *Lebron* proves irrelevant, grant and summarily reverse on the content-neutrality point. Accordingly, I respectfully dissent from the denial of the petition for a writ of certiorari.

No. 93–1488. NEW YORK *v.* MARTINEZ. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 83 N. Y. 2d 26, 628 N. E. 2d 1320.

No. 93–1596. ALABAMA *v.* WATKINS. Ct. Crim. App. Ala. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 632 So. 2d 555.

No. 93–1578. DIOCESE OF COLORADO ET AL. *v.* MOSES, NKA TENANTRY. Sup. Ct. Colo. Motions of American Association of Pastoral Counselors, Colorado Catholic Conference et al., and Bear Valley Church of Christ et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 863 P. 2d 310.

No. 93–1610. COLLINS LICENSING *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. Fed. Cir. Certiorari denied. JUSTICE

O'CONNOR took no part in the consideration or decision of this petition. Reported below: 11 F. 3d 1072.

No. 93–8622. MATTHEWS *v.* SOUTH CAROLINA. Ct. Common Pleas of Charleston County, S. C. Certiorari denied.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 93–1314. TAUBER *v.* SALOMON FOREX, INC., ET AL., *ante*, p. 1031;

No. 93–1344. FITZGERALD *v.* MONTANA DEPARTMENT OF FAMILY SERVICES ET AL., *ante*, p. 1032;

No. 93–7028. NELSON *v.* JONES, *ante*, p. 1020;

No. 93–7288. BOALBEY *v.* HAWES ET AL., 510 U. S. 1132;

No. 93–7736. TYLER *v.* PURKETT, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, ET AL., *ante*, p. 1008;

No. 93–7757. LIGHT *v.* KIRK, JUDGE, *ante*, p. 1008;

No. 93–7810. SNELL *v.* CITY AND COUNTY OF DENVER ET AL., 510 U. S. 1203;

No. 93–7938. THOMPSON *v.* UNITED STATES, *ante*, p. 1038; and

No. 93–7985. TAYLOR *v.* STRICKLAND ET AL., *ante*, p. 1039. Petitions for rehearing denied.

No. 93–7530. OMOIKE *v.* LOUISIANA STATE UNIVERSITY, 510 U. S. 1199. Motion for leave to file petition for rehearing denied.

JUNE 3, 1994

Dismissal Under Rule 46

No. 93–1103. DUBUQUE PACKING CO., INC. *v.* UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION AFL–CIO, LOCAL NO. 150–A, ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 1016.] Writ of certiorari dismissed under this Court's Rule 46.

JUNE 6, 1994

Certiorari Granted—Vacated and Remanded

No. 93–8707. MASON *v.* OHIO. Ct. App. Ohio, Ashland County. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Stansbury* v. *California, ante,* p. 318.

Miscellaneous Orders

No. ———. GARCEAU *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner granted.

No. A–984 (93–1904). COLORADO *v.* LEFTWICH ET AL. Sup. Ct. Colo. Application to recall and stay mandate, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–696. IN RE DISBARMENT OF HUST. Disbarment entered. [For earlier order herein, see 485 U. S. 985.]

No. D–1353. IN RE DISBARMENT OF CONROY. Disbarment entered. [For earlier order herein, see 510 U. S. 1069.]

No. D–1373. IN RE DISBARMENT OF SWERDLOW. Paul Swerdlow, of Media, Pa., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on March 21, 1994 [510 U. S. 1188], is hereby discharged.

No. D–1398. IN RE DISBARMENT OF SLOAN. It is ordered that Leland Trickett Sloan, of St. Albans, W. Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1399. IN RE DISBARMENT OF AGAJANIAN. It is ordered that Roger James Agajanian, of Mission Viejo, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–1400. IN RE DISBARMENT OF PEGG. It is ordered that Joel T. Pegg, of Sacramento, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1401. IN RE DISBARMENT OF HUNT. It is ordered that A. Thomas Hunt, of Culver City, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1402. IN RE DISBARMENT OF GRIFFIN. It is ordered that James H. Griffin, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1403. IN RE DISBARMENT OF MOSTMAN. It is ordered that Paul Ian Mostman, of Granada Hills, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-1404. IN RE DISBARMENT OF YAMADA. It is ordered that Sunao T. A. Yamada, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 93-714. U. S. BANCORP MORTGAGE CO. *v.* BONNER MALL PARTNERSHIP. C. A. 9th Cir. [Certiorari granted, 510 U. S. 1039.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 93-762. JEROME B. GRUBART, INC. *v.* GREAT LAKES DREDGE & DOCK CO. ET AL.; and

No. 93-1094. CITY OF CHICAGO *v.* GREAT LAKES DREDGE & DOCK CO. ET AL. C. A. 7th Cir. [Certiorari granted, 510 U. S. 1108.] Motion of petitioner City of Chicago for divided argument granted to be divided as follows: petitioner Jerome B. Grubart, Inc., 15 minutes; petitioner City of Chicago, 15 minutes.

No. 93-1001. ALLIED-BRUCE TERMINIX COS., INC., ET AL. *v.* DOBSON ET AL. Sup. Ct. Ala. [Certiorari granted, 510 U. S. 1190.] Motion of American Arbitration Association for leave to file a brief as *amicus curiae* granted.

No. 93-1789. IN RE AZEN; and

No. 93-9072. IN RE HENTHORN. Petitions for writs of mandamus denied.

No. 93–8341. In re Benitez. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 93–1612. NationsBank of North Carolina, N. A., et al. *v.* Variable Annuity Life Insurance Co. et al.; and

No. 93–1613. Ludwig, Comptroller of the Currency, et al. *v.* Variable Annuity Life Insurance Co. et al. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 998 F. 2d 1295.

No. 93–1121. Plaut et al. *v.* Spendthrift Farm, Inc., et al. C. A. 6th Cir. Certiorari granted limited to the following question: "Whether § 27A(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78aa–1, to the extent that it purports to require reinstatement of § 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of § 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution." Reported below: 1 F. 3d 1487.

Certiorari Denied

No. 92–1012. Simpson Paper (Vermont) Co. *v.* Department of Environmental Conservation et al. Sup. Ct. Vt. Certiorari denied. Reported below: 159 Vt. 639, 628 A. 2d 944.

No. 93–1193. Owens *v.* Texas. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 860 S. W. 2d 727.

No. 93–1285. New York State Department of Environmental Conservation et al. *v.* Niagara Mohawk Power Corp. Ct. App. N. Y. Certiorari denied. Reported below: 82 N. Y. 2d 191, 624 N. E. 2d 146.

No. 93–1363. Protect Key West, Inc., dba Last Stand *v.* Perry, Secretary of Defense, et al. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 166.

No. 93–1397. Tucker *v.* Georgia Department of Human Resources ex rel. Cassel. Super. Ct. Glynn County, Ga. Certiorari denied.

No. 93–1411. White *v.* Immigration and Naturalization Service. C. A. 8th Cir. Certiorari denied. Reported below: 6 F. 3d 1312.

No. 93–1449. Methodist Hospital et al. *v.* Shalala, Secretary of Health and Human Services. C. A. D. C. Cir. Certiorari denied. Reported below: 6 F. 3d 829.

No. 93–1458. CBC, Inc., et al. *v.* Board of Governors of the Federal Reserve System. C. A. 10th Cir. Certiorari denied. Reported below: 13 F. 3d 404.

No. 93–1513. Van Engel *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 15 F. 3d 623.

No. 93–1588. Parkridge Investors Limited Partnership *v.* Farmers Home Administration. C. A. 8th Cir. Certiorari denied. Reported below: 13 F. 3d 1192.

No. 93–1606. White et ux. *v.* Browning-Ferris, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 1078.

No. 93–1617. Vollrath Co. *v.* Sammi Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1455.

No. 93–1620. Rubens et al. *v.* Shine, Julianelle, Karp, Bozelko & Karazin, P. C. Ct. App. N. Y. Certiorari denied. Reported below: 82 N. Y. 2d 778, 624 N. E. 2d 685.

No. 93–1622. Gutierrez et al. *v.* United Foods, Inc. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 556.

No. 93–1623. Suggs *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1223.

No. 93–1624. Psarianos et al. *v.* United Kingdom Mutual Steamship Assurance Assn. (Bermuda), Ltd. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 461.

No. 93–1628. Fortin et al. *v.* Roman Catholic Bishop of Worcester. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 416 Mass. 781, 625 N. E. 2d 1352.

No. 93–1640. Billings et al. *v.* Tavaglione. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 93–1642. Davis *v.* Davis. Super. Ct. Pa. Certiorari denied.

No. 93–1649. Allstate Insurance Co. *v.* Louisiana Insurance Guaranty Assn. et al. Sup. Ct. La. Certiorari denied. Reported below: 630 So. 2d 714.

No. 93–1655. McMaster, nka Hines *v.* Iowa Board of Psychology Examiners. Sup. Ct. Iowa. Certiorari denied. Reported below: 509 N. W. 2d 754.

No. 93–1661. Transamerican Natural Gas Corp. *v.* Zapata Partnership, Ltd. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 480.

No. 93–1695. Travitz *v.* Northeast Department ILGWU Health and Welfare Fund et al. C. A. 3d Cir. Certiorari denied. Reported below: 13 F. 3d 704.

No. 93–1715. Jarmusik *v.* Merit Systems Protection Board. C. A. Fed. Cir. Certiorari denied. Reported below: 6 F. 3d 786.

No. 93–1751. Bray Terminals, Inc., et al. *v.* New York State Department of Taxation and Finance. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 191 App. Div. 2d 668, 596 N. Y. S. 2d 717.

No. 93–1752. Fairfax County School Board *v.* Fairfax Covenant Church. C. A. 4th Cir. Certiorari denied. Reported below: 17 F. 3d 703.

No. 93–1763. Hall *v.* Melendez. Sup. Ct. P. R. Certiorari denied.

No. 93–7580. Boggs *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–7893. Hartsock *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 93–7923. Loomis *v.* Vernon et al. Sup. Ct. Idaho. Certiorari denied.

No. 93–8152. Shelton *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93–8234. Lewin *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 5 F. 3d 1497.

No. 93–8264. Durbin *v.* Durbin et al. C. A. 9th Cir. Certiorari denied. Reported below: 12 F. 3d 1106.

No. 93–8324. LUPE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 32.

No. 93–8362. GAREY *v.* OH ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 12 F. 3d 219.

No. 93–8384. SAMUELS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 52.

No. 93–8485. JACKSON *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 6 F. 3d 787.

No. 93–8510. MARK *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 7 F. 3d 228.

No. 93–8516. PARRIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 418.

No. 93–8564. GERALD, AKA JONES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 5 F. 3d 563.

No. 93–8618. PRICE *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 11 F. 3d 1073.

No. 93–8644. VAN WINKLE *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 254 Kan. 214, 864 P. 2d 729.

No. 93–8663. MINH TRONG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8685. WRIGHT *v.* WHITLEY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 11 F. 3d 542.

No. 93–8689. VAN HAELE *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 261 Mont. 536, 868 P. 2d 641.

No. 93–8691. SPENCER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8692. SINGLETON *v.* CARMICHAEL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 596.

No. 93–8704. FLORES-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93–8706. RUIZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 418.

No. 93–8710. Mitchell *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8716. Corugedo *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 11 F. 3d 165.

No. 93–8719. Flowers *v.* Jordan, Administrator, Wisconsin Division of Probation and Parole. C. A. 7th Cir. Certiorari denied. Reported below: 12 F. 3d 1100.

No. 93–8720. McKay *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 179.

No. 93–8721. Rivera *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8724. Salter *v.* Whitley, Warden, et al. C. A. 5th Cir. Certiorari denied.

No. 93–8727. Poole *v.* Holland, Warden. C. A. 6th Cir. Certiorari denied.

No. 93–8731. Jackson *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1092.

No. 93–8732. Martinez *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 93–8739. Steinbronn *v.* City of Philadelphia et al. C. A. 3d Cir. Certiorari denied. Reported below: 6 F. 3d 780.

No. 93–8757. Wolfe *v.* California et al. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 93–8778. Sei Young Choi *v.* Parmet et al. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–8824. Floyd et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8842. Mackey *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 14 F. 3d 597.

No. 93–8848. Senich *v.* Lambdin. C. A. 11th Cir. Certiorari denied.

No. 93–8851. Baker *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8858. Huffman *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 10 F. 3d 1197.

No. 93–8898. Gonzales *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied. Reported below: 14 F. 3d 55.

No. 93–8900. Howard *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–8902. Johnson *v.* Scott, Director, Texas Department of Criminal Justice, Institutional Division. C. A. 5th Cir. Certiorari denied.

No. 93–8911. Okor *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 93–8916. Chahine *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1221.

No. 93–8918. Stetter *v.* South Dakota. Sup. Ct. S. D. Certiorari denied. Reported below: 513 N. W. 2d 87.

No. 93–8921. Herrera-Duran *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 17 F. 3d 391.

No. 93–8932. Brown *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 8 F. 3d 71.

No. 93–8934. Patterson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 15 F. 3d 179.

No. 93–8936. Mendoza *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1093.

No. 93–8938. Loudermilk *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1093.

No. 93–8939. Leeper *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 12 F. 3d 1103.

No. 93–8940. Mitchell *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 17 F. 3d 1437.

No. 93–8942. Villanueva *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 15 F. 3d 197.

No. 93–8946. Harris *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 8 F. 3d 821.

No. 93–8947. Fierro-Gaxiola *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93–8948. Hester *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 21 F. 3d 428.

No. 93–8949. Frushon *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 10 F. 3d 663.

No. 93–8952. Harris *v.* United States; and
No. 93–8963. Harris *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1090.

No. 93–8953. Klimas *v.* Department of the Treasury. C. A. 9th Cir. Certiorari denied. Reported below: 17 F. 3d 395.

No. 93–8955. West *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–8960. Reynolds *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 19 F. 3d 1444.

No. 93–8961. Warner *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 10 F. 3d 1236.

No. 93–8964. Valdes-Puig *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 645.

No. 93–8965. Valencia *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 149.

No. 93–8966. Haynes *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 12.

No. 93–8969. Netters *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 6 F. 3d 586.

No. 93–8971. Montalvo *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 995 F. 2d 234.

No. 93–8973. Mayfield *v.* Michigan Board of Law Examiners et al. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1220.

No. 93–8974. HERRERA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 418.

No. 93–8983. COLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1091.

No. 93–8985. BROWN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 8 F. 3d 31.

No. 93–8987. COCKRELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 18 F. 3d 1156.

No. 93–8988. CLEMONS *v.* ARVONIO, SUPERINTENDENT, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 93–8989. FRANKLIN *v.* LUMMIS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 12 F. 3d 208.

No. 93–8993. TRIPLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 1094.

No. 93–8994. PAULK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 16 F. 3d 1222.

No. 93–8996. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 1431.

No. 93–9003. RYSKAMP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 93–9005. LARNER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 10 F. 3d 805.

No. 93–9008. HEARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 9 F. 3d 1554.

No. 93–9010. GUTIERREZ-AMEZQUITA, AKA LUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 21 F. 3d 1107.

No. 93–9017. OJEDA CHANG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 645.

No. 93–9022. AVERY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 15 F. 3d 816.

No. 93–9024. Akech *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 19 F. 3d 644.

No. 93–9029. Mata *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 5 F. 3d 542.

No. 93–9030. Ritchie *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 15 F. 3d 272.

No. 93–9032. Myers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–9034. Pace *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 10 F. 3d 1106.

No. 93–9038. Brower *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 16 F. 3d 405.

No. 93–9047. Hess *v.* Arizona. Ct. App. Ariz. Certiorari denied.

No. 93–9050. Ogunde *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 16 F. 3d 413.

No. 93–9053. Lyle *v.* Department of Corrections et al. Sup. Ct. Mich. Certiorari denied. Reported below: 444 Mich. 956, 514 N. W. 2d 767.

No. 93–9057. Newkirk *v.* Smith, Warden, et al. C. A. 4th Cir. Certiorari denied. Reported below: 19 F. 3d 11.

No. 93–9069. Vela *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 19 F. 3d 20.

No. 93–9074. Font, aka Navarro *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 17 F. 3d 1431.

No. 93–9075. Hunt *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 16 F. 3d 418.

No. 93–9091. Dunne *v.* Keohane, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 14 F. 3d 335.

No. 93–9094. Burton *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 19 F. 3d 30.

No. 93–1338. J. Alexander Securities, Inc. *v.* Mendez. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 17 Cal. App. 4th 1083, 21 Cal. Rptr. 2d 826.

Justice O'Connor, with whom The Chief Justice joins, dissenting.

Petitioner is a Los Angeles brokerage firm. When respondent opened an account there, she executed an agreement providing for arbitration of all disputes. See 17 Cal. App. 4th 1083, 1087, n. 2, 21 Cal. Rptr. 2d 826, 828, n. 2 (1993). The contract also provided that "'[t]his agreement and its enforcement shall be governed by the laws of the State of New York.'" *Id.*, at 1087, 21 Cal. Rptr. 2d, at 827. In 1991, respondent alleged that petitioner and one of its employees had engaged in various deceptive practices, resulting in financial losses to respondent. The parties submitted the dispute to a panel of three arbitrators convened in accordance with the rules of the National Association of Securities Dealers (NASD). The panel awarded respondent $27,000 in compensatory damages and $27,000 in punitive damages for petitioner's failure to adequately supervise the employee. *Id.*, at 1087–1088, 21 Cal. Rptr. 2d, at 828.

Petitioner sought to have the punitive damages portion of the award set aside, arguing that New York law prohibits arbitrators from awarding punitive damages. See *Garrity* v. *Lyle Stuart, Inc.*, 40 N. Y. 2d 354, 353 N. E. 2d 793 (1976). The trial court declined to correct the award. Relying on the Federal Arbitration Act, 9 U. S. C. §2 *et seq.* (1988 ed. and Supp. IV), the California Court of Appeal affirmed. The court concluded that "[t]he choice of law provision [in the contract] merely designates the substantive law that the arbitrators must apply in determining whether the conduct of the parties warrants an award of punitive damages; it does not deprive the arbitrators of their authority to award punitive damages." 17 Cal. App. 4th, at 1091, 21 Cal. Rptr. 2d, at 830.

The decision below is in accord with several federal decisions holding that the Arbitration Act pre-empts state law prohibitions on arbitral punitive damages awards. See, *e. g.*, *Todd Shipyards Corp.* v. *Cunard Line, Ltd.*, 943 F. 2d 1056 (CA9 1991); *Bonar* v. *Dean Witter Reynolds, Inc.*, 835 F. 2d 1378 (CA11 1988). But the Court of Appeal expressly "decline[d] to follow two Second Circuit cases, which held . . . that state law relating to the propriety of a punitive damages award by an arbitrator is not preempted by federal substantive law, and thus vacated the punitive damage[s] award." 17 Cal. App. 4th, at 1091, n. 7, 21 Cal. Rptr. 2d, at 830, n. 7, citing *Barbier* v. *Shearson Lehman Hutton, Inc.*, 948 F. 2d 117 (CA2 1991), and *Fahnestock & Co.* v. *Waltman*, 935 F. 2d 512 (CA2 1991).

Moreover, the decision below irreconcilably conflicts with *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 20 F. 3d 713 (CA7 1994). In *Mastrobuono*, the investor signed an agreement with the brokerage house containing an arbitration provision and a New York choice-of-law clause identical to those in the agreement in this case. The investor brought the same kinds of claims as respondent did—churning and unauthorized trading—and they were submitted to arbitration pursuant to NASD rules. The arbitration panel awarded punitive damages against the brokerage firm, but the Court of Appeals for the Seventh Circuit held that the award should be set aside. See 9 U. S. C. § 10(a)(4) (1988 ed., Supp. IV) (authorizing set-aside where "the arbitrators exceeded their powers"). The court acknowledged the strong federal policy favoring arbitration, but also noted that the policy "is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate." *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 476 (1989) (emphasis added). By incorporating New York law into the agreement, the court reasoned, the parties agreed to be bound by the New York prohibition on arbitrators' awarding punitive damages. The Seventh Circuit expressly "recognize[d] that some circuit courts have reached a different result." 20 F. 3d, at 718, citing *Bonar* v. *Dean Witter Reynolds, Inc., supra; Raytheon Co.* v. *Automated Business Systems, Inc.*, 882 F. 2d 6 (CA1 1989); *Todd Shipyards Corp.* v. *Cunard Line, Ltd., supra; Lee* v. *Chica*, 983 F. 2d 883 (CA8), cert. denied, 510 U. S. 906 (1993).

To this list of conflicting decisions may be added the decision below. The result is that courts in different jurisdictions reach contrary results with respect to the availability of punitive damages in cases involving similarly situated parties and identical arbitration agreements. The Federal Arbitration Act was passed, in part, to prevent this kind of disarray. Because most securities agreements contain arbitration provisions, and many are governed by New York law, the ability of arbitrators to award punitive damages in these circumstances is an important and recurring question of federal law. The state and federal courts have divided as to how this question should be answered; I would therefore grant the petition for a writ of certiorari.

No. 93-1637. MEDICAL SOCIETY OF THE STATE OF NEW YORK ET AL. *v.* SOBOL, COMMISSIONER OF THE DEPARTMENT OF EDUCATION OF NEW YORK, ET AL. Ct. App. N. Y. Motion of American Medical Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 82 N. Y. 2d 802, 624 N. E. 2d 696.

No. 93-8109. HUGHES *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner to strike the brief in opposition denied. Certiorari denied. Reported below: 878 S. W. 2d 142.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentence in this case.

No. 93-8151. MORAN *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 93-8207. ESPINOSA *v.* FLORIDA. Sup. Ct. Fla.; and
No. 93-8636. GEORGE *v.* MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied. Reported below: No. 93-8151, 535 Pa. 485, 636 A. 2d 612; No. 93-8207, 626 So. 2d 165.

JUSTICE BLACKMUN, dissenting.

Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins* v. *Collins*, 510 U. S. 1141, 1143 (1994), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 93-1235. AUSTIN ET AL. *v.* UNITED PARCEL SERVICE, 510 U. S. 1196;
No. 93-1391. HORNBACK *v.* UNITED STATES, *ante*, p. 1070;
No. 93-1472. SIEGEL *v.* JAMES ISLAND PUBLIC SERVICE DISTRICT ET AL., *ante*, p. 1053;
No. 93-6893. HOLLY *v.* BRENNAN, WARDEN, ET AL., *ante*, p. 1047;

No. 93–7421. BAKER *v.* SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, *ante,* p. 1035;

No. 93–7479. SHOCKEY *v.* BADGER COAL CO. ET AL., *ante,* p. 1035;

No. 93–7773. BOOTHE *v.* STANTON, *ante,* p. 1009;

No. 93–8063. ROSE ET AL. *v.* MERRELL DOW PHARMACEUTICALS ET AL., *ante,* p. 1040;

No. 93–8099. ERWIN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, *ante,* p. 1025;

No. 93–8246. BUCHANAN *v.* SOUTH CAROLINA, *ante,* p. 1074; and

No. 93–8296. TAYLOR *v.* JOHNSON, WARDEN, *ante,* p. 1044. Petitions for rehearing denied.

JUNE 7, 1994

Dismissal Under Rule 46

No. 93–8811. IN RE KUKES. Petition for writ of mandamus dismissed under this Court's Rule 46.

AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 29, 1994, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1156. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and the amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, and 507 U. S. 1059.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1994

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 1, 3, 5, 5.1, 9, 13, 21, 25, 26.1, 27, 28, 30, 31, 33, 35, 38, 40, 41, and 48.

[See *infra*, pp. 1159–1168.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 1994, and shall govern all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings in appellate cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 1. Scope of rules and title.

(*a*) *Scope of rules.*—These rules govern procedure in appeals to United States courts of appeals from the United States district courts and the United States Tax Court; in appeals from bankruptcy appellate panels; in proceedings in the courts of appeals for review or enforcement of orders of administrative agencies, boards, commissions and officers of the United States; and in applications for writs or other relief which a court of appeals or a judge thereof is competent to give. When these rules provide for the making of a motion or application in the district court, the procedure for making such motion or application shall be in accordance with the practice of the district court.

(*b*) *Rules not to affect jurisdiction.*—These rules shall not be construed to extend or limit the jurisdiction of the courts of appeals as established by law.

(*c*) *Title.*—These rules may be known and cited as the Federal Rules of Appellate Procedure.

Rule 3. Appeal as of right—how taken.

(*a*) *Filing the notice of appeal.*—An appeal permitted by law as of right from a district court to a court of appeals must be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of subdivision (d) of this Rule 3. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U. S. C. § 1292(b) and appeals in bankruptcy must be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

* * * * *

Rule 5. Appeal by permission under 28 U. S. C. § 1292(b).

* * * * *

(c) *Form of papers; number of copies.*—All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Rule 5.1. Appeal by permission under 28 U. S. C. § 636(c)(5).

* * * * *

(c) *Form of papers; number of copies.*—All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

* * * * *

Rule 9. Release in a criminal case.

(a) *Appeal from an order regarding release before judgment of conviction.*—The district court must state in writing, or orally on the record, the reasons for an order regarding release or detention of a defendant in a criminal case. A party appealing from the order, as soon as practicable after filing a notice of appeal with the district court, must file with the court of appeals a copy of the district court's order and its statement of reasons. An appellant who questions the factual basis for the district court's order must file a transcript of any release proceedings in the district court or an explanation of why a transcript has not been obtained. The appeal must be determined promptly. It must be heard, after reasonable notice to the appellee, upon such papers, affidavits, and portions of the record as the parties present or the court may require. Briefs need not be filed unless the court so orders. The court of appeals or a judge thereof may order the release of the defendant pending decision of the appeal.

(*b*) *Review of an order regarding release after judgment of conviction.*—A party entitled to do so may obtain review of a district court's order regarding release that is made after a judgment of conviction by filing a notice of appeal from that order with the district court, or by filing a motion with the court of appeals if the party has already filed a notice of appeal from the judgment of conviction. Both the order and the review are subject to Rule 9(a). In addition, the papers filed by the applicant for review must include a copy of the judgment of conviction.

(*c*) *Criteria for release.*—The decision regarding release must be made in accordance with applicable provisions of 18 U. S. C. §§3142, 3143, and 3145(c).

Rule 13. Review of a decision of the Tax Court.

(*a*) *How obtained; time for filing notice of appeal.*—Review of a decision of the United States Tax Court must be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after entry of the Tax Court's decision. At the time of filing the appellant must furnish the clerk with sufficient copies of the notice of appeal to enable the clerk to comply promptly with the requirements of Rule 3(d). If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the Tax Court's decision.

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Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs.

* * * * *

(*d*) *Form of papers; number of copies.*—All papers may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 25. Filing and service.

(*a*) *Filing.*—A paper required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing, except that briefs and appendices are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used. Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's internal mail system on or before the last day for filing. Timely filing of papers by an inmate confined in an institution may be shown by a notarized statement or declaration (in compliance with 28 U. S. C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid. If a motion requests relief that may be granted by a single judge, the judge may permit the motion to be filed with the judge, in which event the judge shall note thereon the filing date and thereafter give it to the clerk. A court of appeals may, by local rule, permit papers to be filed by facsimile or other electronic means, provided such means are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices.

. . . . .

(*d*) *Proof of service.*—Papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service, of the names of the persons served, and of the addresses to which the papers were mailed or at which they were delivered, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.

(*e*) *Number of copies.*—Whenever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case.

Rule 26.1. Corporate disclosure statement.

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

Rule 27. Motions.

. . . . .

(*d*) *Form of papers; number of copies.*—All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 28. Briefs.

(*a*) *Appellant's brief.*—The brief of the appellant must contain, under appropriate headings and in the order here indicated:

. . . . .

(*5*) *A summary of argument.*—The summary should contain a succinct, clear, and accurate statement of the arguments made in the body of the brief. It should not be a mere repetition of the argument headings.

(*6*) *An argument.*—The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on. The argument must also include for each issue a concise statement of the applicable standard of review; this statement may appear in the discussion of each issue or under a separate heading placed before the discussion of the issues.

(7) *A short conclusion stating the precise relief sought.*

(*b*) *Appellee's brief.*—The brief of the appellee must conform to the requirements of paragraphs (a)(1)(6), except that none of the following need appear unless the appellee is dissatisfied with the statement of the appellant:

(1) the jurisdictional statement;
(2) the statement of the issues;
(3) the statement of the case;
(4) the statement of the standard of review.

. . . . .

(*g*) *Length of briefs.*—Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc.

. . . . .

Rule 30. Appendix to the briefs.

(*a*) *Duty of appellant to prepare and file; content of appendix; time for filing; number of copies.*—The appellant must prepare and file an appendix to the briefs which must contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record to which the parties wish to direct the particular attention of the court. Except where they have independent relevance, memoranda of law in the district court should not be included in the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant must serve and file the appendix with the brief. Ten copies of the appendix must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court requires the filing or service of a different number by local rule or by order in a particular case.

. . . . .

Rule 31. Filing and service of a brief.

. . . . .

(*b*) *Number of copies to be filed and served.*—Twenty-five copies of each brief must be filed with the clerk, and two copies must be served on counsel for each party separately represented unless the court requires the filing or service of a different number by local rule or by order in a particular case. If a party is allowed to file typewritten ribbon and carbon copies of the brief, the original and three legible copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented.

. . . . .

Rule 33. Appeal conferences.

The court may direct the attorneys, and in appropriate cases the parties, to participate in one or more conferences to address any matter that may aid in the disposition of the proceedings, including the simplification of the issues and the possibility of settlement. A conference may be conducted in person or by telephone and be presided over by a judge or other person designated by the court for that purpose. Before a settlement conference, attorneys must consult with their clients and obtain as much authority as feasible to settle the case. As a result of a conference, the court may enter an order controlling the course of the proceedings or implementing any settlement agreement.

Rule 35. Determination of causes by the court in banc.

* * * * *

(*d*) *Number of copies.*—The number of copies that must be filed may be prescribed by local rule and may be altered by order in a particular case.

Rule 38. Damages and costs for frivolous appeals.

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Rule 40. Petition for rehearing.

(*a*) *Time for filing; content; answer; action by court if granted.*—A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

* * * * *

Rule 41. Issuance of mandate; stay of mandate.

(*a*) *Date of issuance.*—The mandate of the court must issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate must issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

(*b*) *Stay of mandate pending petition for certiorari.*—A party who files a motion requesting a stay of mandate pending petition to the Supreme Court for a writ of certiorari must file, at the same time, proof of service on all other parties. The motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The stay cannot exceed 30 days unless the period is extended for cause shown or unless during the period of the stay, a notice from the clerk of the Supreme Court is filed showing that the party who has obtained the stay has filed a petition for the writ, in which case the stay will continue until final disposition by the Supreme Court. The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed. The court may require a bond or other security as a condition to the grant or continuance of a stay of the mandate.

Rule 48. Masters.

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 29, 1994, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1170. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments do not take effect until so reported to Congress and until the expiration of 90 days thereafter.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, and 507 U. S. 1075.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1994

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court pursuant to Section 2075 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 8002 and 8006.

[See *infra*, pp. 1173–1174.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on August 1, 1994, and shall govern all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings in bankruptcy cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 8002. Time for filing notice of appeal.

* * * * *

(*b*) *Effect of motion on time for appeal.*—If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

(1) to amend or make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;

(2) to alter or amend the judgment under Rule 9023;

(3) for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

* * * * *

Rule 8006. Record and issues on appeal.

Within 10 days after filing the notice of appeal as provided by Rule 8001(a), entry of an order granting leave to appeal, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. Within 10 days after the service of the appellant's statement the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross appeal, the appellee as cross appellant shall file and serve a statement of the issues to be presented on the cross appeal and a designation of additional items to be included in the record. A cross appellee may, within 10 days of service of the cross appellant's statement, file and serve on the cross appellant a designation of additional items to be included in the record. The record on appeal shall include the items so designated by the parties, the notice of appeal, the judgment, order, or decree appealed from, and any opinion, findings of fact, and conclusions of law of the court. Any party filing a designation of the items to be included in the record shall provide to the clerk a copy of the items designated or, if the party fails to provide the copy, the clerk shall prepare the copy at the party's expense. If the record designated by any party includes a transcript of any proceeding or a part thereof, the party shall, immediately after filing the designation, deliver to the reporter and file with the clerk a written request for the transcript and make satisfactory arrangements for payment of its cost. All parties shall take any other action necessary to enable the clerk to assemble and transmit the record.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 29, 1994, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1176. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and the amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, and 507 U. S. 1161.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1994

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 16, 29, 32, and 40.

[See *infra*, pp. 1179–1186.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1994, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and inspection.

(*a*) *Governmental disclosure of evidence.*

(*1*) *Information subject to disclosure.*

(*A*) *Statement of defendant.*—Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a defendant which is an organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person who the government contends (1) was, at the time of making the statement, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the person was involved.

. . . . .

Rule 29. Motion for judgment of acquittal.

. . . . .

(*b*) *Reservation of decision on motion.*—The court may reserve decision on a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

. . . . .

[Rule 32 is deleted and replaced with the following]

Rule 32. Sentence and judgment.

(*a*) *In general; time for sentencing.*—When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(*b*) *Presentence investigation and report.*

(*1*) *When made.*—The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed, unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U. S. C. § 3553; and

(B) the court explains this finding on the record.

(*2*) *Presence of counsel.*—On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(*3*) *Nondisclosure.*—The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(*4*) *Contents of the presentence report.*—The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U. S. C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U. S. C. § 994(a)(1); and the probation officer's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U. S. C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U. S. C. § 3552(b); and

(G) any other information required by the court.

(5) *Exclusions.*—The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) *Disclosure and objections.*

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(*c*) *Sentence.*

(*1*) *Sentencing hearing.*—At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(*2*) *Production of statements at sentencing hearing.*—Rule 26.2(a)–(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(*3*) *Imposition of sentence.*—Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence; and

(D) afford the attorney for the Government an equivalent opportunity to speak to the court.

(*4*) *In camera proceedings.*—The court's summary of information under subdivision (c)(3)(A) may be in camera. Upon joint motion by the defendant and by the attorney for the Government, the court may hear in camera the statements—made under subdivision (c)(3)(B), (C), and (D)—by the defendant, the defendant's counsel, or the attorney for the Government.

(*5*) *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

(*d*) *Judgment.*

(*1*) *In general.*—A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered accordingly. The judgment must be signed by the judge and entered by the clerk.

(*2*) *Criminal forfeiture.*—When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the interest or property subject to forfeiture on terms that the court considers proper.

(*e*) *Plea withdrawal.*—If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U. S. C. §2255.

Rule 40. Commitment to another district.

. . . . .

(*d*) *Arrest of probationer or supervised releasee.*—If a person is arrested for a violation of probation or supervised release in a district other than the district having jurisdiction, such person must be taken without unnecessary delay before the nearest available federal magistrate judge. The person may be released under Rule 46(c). The federal magistrate judge shall:

(1) Proceed under Rule 32.1 if jurisdiction over the person is transferred to that district;

(2) Hold a prompt preliminary hearing if the alleged violation occurred in that district, and either (i) hold the person to answer in the district court of the district hav-

ing jurisdiction or (ii) dismiss the proceedings and so notify that court; or

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate judge is the person named in the warrant.

* * * * *

AMENDMENTS TO FEDERAL RULES OF EVIDENCE

The following amendments to the Federal Rules of Evidence were prescribed by the Supreme Court of the United States on April 29, 1994, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1188. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence, and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, and 507 U. S. 1187.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 29, 1994

To the Senate and House of Representatives of the United States of America in Congress Assembled:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. The Court has withheld that portion of the proposed amendment to Rule of Evidence 412 transmitted to the Supreme Court by the Judicial Conference of the United States which would apply that Rule to civil cases. The reasons for the Court's action are set forth in the attached letter to Judge Gerry, Chairman of the Executive Committee of the Judicial Conference of the United States.

Accompanying this rule are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Note submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Note was not revised to account for the Court's action, because the Note is the commentary of the advisory committee.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 29, 1994

ORDERED:

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein an amendment to Evidence Rule 412.

[See *infra*, pp. 1191–1192.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 1994, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 412. Admissibility of alleged victim's sexual behavior or alleged sexual predisposition.

(*a*) *Evidence generally inadmissible.*—The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and

(2) evidence offered to prove any alleged victim's sexual predisposition.

(*b*) *Exceptions.*—In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(3) evidence the exclusion of which would violate the constitutional rights of the defendant.

(*c*) *Procedure to determine admissibility.*

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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